Supreme Court, U.S.
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In The

Supreme Court of the United States

RENEE S. HARTZ, M.D.,

Petitioner,

v.

VICTOR R. FARRUGIA; ROBERT A. KUTCHER; NICOLE TYGIER; CHOPIN, WAGAR, RICHARD, AND KUTCHER, LLP,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, when the United States Fifth Circuit Court of Appeals affirmed the decision dismissing Petitioner's legal malpractice claim, the Fifth Circuit Court of Appeals sanctioned such a departure from the accepted course of judicial proceedings as to call for an exercise of this Court's supervisory power?

PARTIES

The Petitioner is Renee S. Hartz, M.D. ("Dr. Hartz").

The parties in the courts below were Dr. Hartz and her former attorneys, Robert A. Kutcher, Esq. ("Mr. Kutcher") and Nicole Tygier, Esq. ("Ms. Tygier") of Chopin, Wagar, Richard, and Kutcher, LLP.

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The opinion of the United States Court of Appeals for the Fifth Circuit sought to be reviewed is unpublished. (App. 1-2). The district court Order And Reasons, *Hartz v. Farrugia, et al.*, is published at 2009 WL 901767 (E.D.La. 2009). (App. 3-18).

JURISDICTION

By a Petition for Writ of Certiorari pursuant to the jurisdiction conferred by 28 U.S.C. § 1254(1), Petitioner seeks this Court's review of the judgment entered on January 11, 2010 by the United States Circuit Court of Appeals for the Fifth Circuit. This Petition is timely filed because it was mailed within ninety days of February 9, 2010, the date a Petition for Rehearing was denied in the court below. United States Supreme Court Rules 13.3 and 29.2.

STATUTORY PROVISION INVOLVED

Fed. R. Civ. P. 56(c) in pertinent part provides:

. . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

REASON FOR GRANTING THE PETITION

The district court erred in granting summary judgment on Dr. Hartz's legal malpractice claim against Mr. Kutcher, Ms. Tygier and Chopin, Wagar, Richard, and Kutcher, LLP. The district court ignored specific facts in the record showing the existence of genuine issues of material fact for trial concerning Mr. Kutcher and Ms. Tygier's scope of the representation and their duty to her. The district court also misconstrued the facts and drew inferences in favor of Mr. Kutcher and Ms. Tygier.

The Fifth Circuit Court of Appeals affirmed without reasons. In so doing the Fifth Circuit sanctioned such a departure from the accepted course of judicial proceedings by the district court as to call for an exercise of this Court's supervisory power.

STATEMENT OF THE CASE
PROCEDURAL HISTORY

On June 16, 2006 Dr. Hartz filed suit against Mr. Victor Farrugia ("Mr. Farrugia"), Mr. Kutcher, Ms. Tygier, and Chopin, Wagar, Richard, and Kutcher, LLP (C.A. No. 06-4164) for legal malpractice. Jurisdiction in the Eastern District of Louisiana was based on diversity.

Dr. Hartz alleged Mr. Farrugia had failed to timely file a state law discrimination claim against Tulane University ("Tulane") and Tulane University

Hospital and Clinic ("TUHC").[1] The district court determined that Tulane, a non-profit educational institution, could not be sued under the state law discrimination statute and TUHC was not Dr. Hartz's "employer."[2] Dr. Hartz's sole claim against Mr. Farrugia that he had failed to timely file a state law discrimination claim against Tulane and TUHC was dismissed.[3] Dr. Hartz did *not* sue Mr. Farrugia for failure to timely file an EEOC charge[4] because such claim was perempted[5] as more than three years[6] elapsed before she learned of such failure.

Dr. Hartz alleged Mr. Kutcher and Ms. Tygier, of Chopin, Wagar, Richard, and Kutcher, LLP, failed to advise her of a legal malpractice claim against Mr. Farrugia and the time periods within which such a legal malpractice claim must be made. Dr. Hartz alleged that because of their failure, she did not learn

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[1] R.24, Complaint par.24. R.217-218.

[2] R.226, 289.

[3] R.226, 289, Order and Reasons, July 18, 2008, and October 3, 2008.

[4] R.25-27, Complaint par.29, 30, 31(2), 33, 36. Although Dr. Hartz had not sued Mr. Farrugia for legal malpractice for failing to advise her to timely file an EEOC charge, the district court in its March 31, 2009 Order and Reasons, page 3, stated that Dr. Hartz sued Mr. Farrugia for legal malpractice for failing to advise her to timely file an EEOC charge. App. 5, R.1660.

[5] Peremption is a period of time fixed by law within which a right must be exercised or be forever lost, La. Civil Code article 3458.

[6] La. Rev. Stat. Ann. § 9:5605(A)(2007).

of the legal malpractice claim within the time period allowed for bringing a legal malpractice claim against Mr. Farrugia, and lost the right to bring such claim.

The district court granted Mr. Kutcher and Ms. Tygier's motion for summary judgment on the legal malpractice claim. A final judgment was signed April 1, 2009. On April 24, 2009 Dr. Hartz filed a notice of appeal. An order taxing costs against Dr. Hartz was entered. The costs ($3,021.16) were paid.

The Fifth Circuit affirmed the district court's judgment and stated: "there is no reversible error." (App. 2). The Fifth Circuit denied Dr. Hartz's Petition for a Rehearing. (App. 21).

FACTS

By May 8, 1997 letter, Tulane University School of Medicine offered Dr. Hartz "a full-time tenure track faculty position with the rank of professor" and stated "an application for tenure will be submitted when you arrive, with the full support of the department of Surgery." From July 1997 until June 30, 2003, Dr. Hartz, a Board Certified Thoracic Surgeon, was employed at Tulane as a Professor of Surgery, Department of Surgery, Division of Thoracic Surgery. Dr. Hartz was denied tenure in May 1999.

After the tenure denial, Dr. Hartz, a female, filed a charge of sex discrimination with the Equal Employment Opportunity Commission ("EEOC"). In

April 2001, Tulane President Scott Cowan proposed a settlement agreement – an additional probationary appointment guaranteeing that Dr. Hartz would receive tenure review during the additional probationary appointment.

Per the settlement agreement, Dr. Hartz was again considered for tenure May 20, 2002. The Tulane Medical School's Personnel and Honors ("P & H") Committee, the duly constituted faculty body charged with rendering a decision as to whether Dr. Hartz was qualified for an award of tenure, determined she was qualified for tenure, and voted in her favor 7-2 to recommend an award of tenure.

Despite the Tulane Medical School's P & H Committee's determination that Dr. Hartz was qualified for tenure and its recommendation to award her tenure, the Executive Faculty Committee ("EFC"), an administrative committee, rejected the recommendation. Dr. Hewitt, the Surgery Department Chairman, whom Dr. Hartz had alleged had discriminated and retaliated against her, was a participating member of the Executive Faculty Committee. Dr. Hewitt did not abstain from the vote taken by the EFC regarding Dr. Hartz's tenure.

On June 21, 2002 the Dean of the Tulane Medical School informed Dr. Hartz of the EFC's decision to reject the P & H Committee's recommendation to award tenure. Subsequently, the matter was returned to the P & H Committee. On July 15, 2002 the P & H

Committee voted again to recommend an award of tenure. However, the EFC rejected, a second time, the July 16, 2002 recommendation of the P & H Committee to award tenure. After the EFC voted on July 16, 2002, a male member of the EFC stated to Dr. Hartz, "You know the boys always vote together."

The Dean concurred with the EFC's decision and notified Dr. Hartz by letter dated July 16, 2002 of the tenure denial decision. The letter also reminded Dr. Hartz that, per the terms of the 2001 settlement agreement, the 2002-2003 academic year would be her terminal year at Tulane. Tulane terminated Dr. Hartz's employment on June 30, 2003.

The last discriminatory/retaliatory act concerning Dr. Hartz's denial of tenure occurred on July 16, 2002. On that date the EFC denied Dr. Hartz tenure, which a committee of her peers, senior medical school faculty – Tulane's School of Medicine's P & H Committee – had recommended. Similarly, the last discriminatory/retaliatory act concerning Dr. Hartz's hostile work environment also occurred on July 16, 2002 when her Department Chairman, Dr. Hewitt, participated in the EFC's decision to deny her tenure. Dr. Hewitt did not abstain from the vote taken by the EFC and infected the tenure decision with his discriminatory and retaliatory animus.

On March 26, 2003 Dr. Hartz paid Mr. Farrugia $10,000.00 to represent her in her dispute with Tulane regarding her denial of tenure. By April 17, 2003, 300 days had elapsed from the date Dr. Hartz

received notice of adverse employment action, i.e., the denial of tenure. By May 13, 2003, 300 days had elapsed from the date Dr. Hartz received the second notice of adverse employment action. Mr. Farrugia failed to timely file (and/or advise Dr. Hartz to timely file) an EEOC charge within 300 days of her notice of denial of tenure. Because of Mr. Farrugia's failure to advise Dr. Hartz of the EEOC charge filing deadline, she was unaware of the EEOC charge filing deadline and did not file a timely charge.

After Dr. Hartz paid Mr. Farrugia $10,000.00 to represent her, she was unable to contact him. Unbeknownst to Dr. Hartz, he was vacationing. Because Dr. Hartz was unable to communicate with Mr. Farrugia, she engaged Mr. Kutcher and Ms. Tygier to represent her in her dispute with Tulane. The EEOC charge filing period had elapsed by the time Mr. Kutcher and Ms. Tygier began their representation of Dr. Hartz in June 2003.

In their Answer to the legal malpractice Complaint, Mr. Kutcher and Ms. Tygier stated, "It is admitted that while plaintiff was continuing to be represented by defendant Victor Farrugia, plaintiff sought additional legal counsel from the law firm defendants concerning her dispute with Tulane."

At her deposition, Dr. Hartz testified:

> (R.982) p.262: I made it very clear to them [Mr. Kutcher and Ms. Tygier] that I came to them because I could not find my counsel [Mr. Farrugia], so I couldn't get him, he

> hadn't been useful to me. He hadn't been upfront with me and so I went to them for their help in remedying the issue of having an attorney who was – (R.982) p.265: . . . I'm asking them to tell me what my options are, what are deadlines, what dates do I have to look forward to? Am I barking up the wrong tree, do I have a real case, has Farrugia led me wrong? . . . I went to them for help. I went to them for help with my dispute against Tulane.
>
> (R.981) p.259: . . . I went to them asking for their help. I went to them begging to help me with this discriminatory dispute with Tulane. I felt that I had been extremely wronged, that I'm very qualified.

Dr. Hartz specifically asked Mr. Kutcher and Ms. Tygier "to tell me what my options are, what are deadlines, what dates do I have to look forward to? Am I barking up the wrong tree, do I have a real case, has Farrugia led me wrong?" Such an inquiry should have prompted Mr. Kutcher and Ms. Tygier to advise Dr. Hartz that the charge filing period had already elapsed, of the legal malpractice claim existing against Mr. Farrugia, and the time periods within which such a claim must be made.

During Mr. Kutcher and Ms. Tygier's representation of Dr. Hartz, she wrote three e-mails discussing their representation, dated 6/6/2003, 6/12/2003, and 6/30/2003. The 6/30/2003 e-mail states, "Bob Kutcher was on vacation in New York but he found time *to read my files and give me some good advice*." It states

Dr. Hartz was concerned during that timeframe about going to the EEOC to file a charge. It also states Dr. Hartz learned from Ms. Tygier that Tulane's In-house Counsel, Mr. John Beal, had stated, "*there is no bargaining . . . period*", i.e., tenure negotiations. The other two contemporaneous e-mails expressed Dr. Hartz's concern that she should go to the EEOC the following month, and should send a letter to Tulane's EEO/VP and Tulane University's Committee on Faculty Tenure, Freedom & Responsibility ("FTFR").

Ms. Tygier's billing statement refers to "EEOC letter" which she reviewed and revised. That letter was sent to 1) Mary Smith, Tulane EEO/VP, 2) Dr. Strong, Tulane FTFR Chair, and 3) delivered to the EEOC to document Dr. Hartz's charge of sex discrimination and retaliation. Ms. Tygier documents the multiple use of the letter in her 6/30/03 billing entry: "Phone call from client regarding letters." (R.470.)

That EEOC letter Ms. Tygier reviewed and revised was used for three purposes, which were the identical three concerns expressed in Dr. Hartz's contemporaneous e-mails, the same concerns which had prompted Dr. Hartz to seek advice from Mr. Kutcher and Ms. Tygier. That letter's first paragraph reads:

> This letter . . . serves as formal documentation to the FTFR regarding the same issues, concerning my complaints of gender discrimination and retaliation. . . . *I should not file a complaint with EEOC "until I received tenure."* Since the FTFR Committee denied me tenure, I am now adding that

> final denial of tenure to my claims of discrimination and retaliation (emphasis added).

Despite knowledge that Dr. Hartz had received notice of denial of tenure by Tulane letters dated June 21, 2002 and July 16, 2002, despite knowledge that Dr. Hartz was complaining of denial of tenure based on sex discrimination and retaliation, despite knowledge that Dr. Hartz was ill advised that she should not file *an EEOC charge* "until [she] received tenure," and despite Dr. Hartz having engaged Mr. Kutcher and Ms. Tygier to help her with her dispute with Tulane, Mr. Kutcher and Ms. Tygier never informed Dr. Hartz: 1) more than 300 days had elapsed from the time Tulane had notified Dr. Hartz she had been denied tenure; 2) the EEOC charge filing period for a denial of tenure claim had elapsed; 3) a legal malpractice claim against Mr. Farrugia existed; and 4) there existed prescriptive/peremptive dates of such legal malpractice claim.

The record shows Mr. Kutcher and/or Ms. Tygier did not provide Dr. Hartz with a written contract/ engagement letter setting forth the scope of their representation. The record also shows Mr. Kutcher and Ms. Tygier did not obtain Dr. Hartz's informed consent to limit the scope of their representation, pursuant to La. Rev. Stat. 37, Chap. 4, App. article 16, Rule 1.2 Louisiana Rules of Professional Conduct.

Dr. Hartz testified that Ms. Tygier eventually told her "just go back to him [Mr. Farrugia]." Dr.

Hartz followed Ms. Tygier's advice and returned to Mr. Farrugia for legal representation when she was told "just go back to him."

After she returned to Mr. Farrugia for legal representation, per Mr. Farrugia's counsel, on August 22, 2003, Dr. Hartz filed a charge with the EEOC. Her EEOC charge was filed 400 days after her notice of denial of tenure. Almost three years later, on March 15, 2006 the EEOC issued Dr. Hartz a "right to sue" letter.

Dr. Hartz, who had been represented in her dispute with Tulane by Mr. Farrugia, Mr. Kutcher, and Ms. Tygier, was unaware of the legal malpractice claims against her former attorneys until June 4, 2006 when she was so advised by undersigned counsel and also advised that Tulane would likely assert that her EEOC charge was untimely filed (Dr. Hartz contacted undersigned counsel on May 31, 2006 and retained undersigned counsel on June 1, 2006. R.1179, Timesheet. R.556, Defendants' "Statement of Undisputed Material Facts," No.XXI).

In related litigation, *Hartz v. Adm. of the Tulane Educational Fund; University Healthcare System, L.C.*, No. 07-30506 (unpublished opinion, p.5) (5th Cir. 2008), Dr. Hartz's denial of tenure claims alleging discrimination based on sex and retaliation for previous protected activity were dismissed by the United States Fifth Circuit Court of Appeals because her EEOC charge had not been timely filed. The untimeliness of the EEOC charge resulted in Dr.

Hartz's inability to challenge the alleged discriminatory and retaliatory conduct pursuant to 42 U.S.C. § 2000e-5(f)(1); *Delaware State College v. Ricks*, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980); *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. ___, 127 S.Ct. 2162, 2166-67, 167 L.Ed.2d 982 (2007).

Dr. Hartz's expert opined about whether Mr. Kutcher and Ms. Tygier breached the standard of care in the Louisiana legal community. The expert stated:

> Mr. Kutcher and Ms. Tygier of the lawfirm Chopin, Wagar, Richard & Kutcher, LLP, consulted thereafter [when Dr. Hartz was unable to contact Mr. Farrugia] had an affirmative duty to advise Dr. Hartz of the potential malpractice claim existing against Mr. Farrugia, and the time periods within which such a claim must be made. These duties are essential components of competent representation, and the failure by counsel to so advise Dr. Hartz [was] a breach of the standard of care in the Louisiana legal community.

As a result of the negligence of Mr. Kutcher and Ms. Tygier, Dr. Hartz suffered injury – the loss of her right to proceed against Mr. Farrugia concerning his negligence in representing her in her Title VII claims. An economist performed an analysis of the value of that lost right.

Dr. Hartz did not fault Mr. Kutcher or Ms. Tygier for the loss of the opportunity to assert claims against

Tulane. Those claims were timebarred when she sought their representation. Dr. Hartz faulted Mr. Kutcher and Ms. Tygier for their failure to inform her that the EEOC charge filing period had elapsed, of the legal malpractice claim she had against Mr. Farrugia, and the time periods within which such a legal malpractice claim must be made.

But for Mr. Kutcher and Ms. Tygier's failure to inform her that the EEOC charge filing period had elapsed, of the legal malpractice claim she had against Mr. Farrugia, and the time periods within which such a claim must be made, Dr. Hartz's could have timely filed a legal malpractice action against Mr. Farrugia for the loss of her Title VII claims.

SUMMARY OF ARGUMENT

The district court ignored specific facts showing the existence of genuine issues of material fact concerning Mr. Kutcher and Ms. Tygier's scope of the representation, their duty to her, and whether they caused Dr. Hartz the loss of her claim against Mr. Farrugia (the underlying claim). The district court also misconstrued facts. Additionally, the district court construed facts in the light most favorable to the movants, Mr. Kutcher and Ms. Tygier, and drew inferences in their favor.

Mr. Kutcher and Ms. Tygier filed two separate Motions For Summary Judgment. In their first motion (Doc.65), Mr. Kutcher and Ms. Tygier contended

there was no legal malpractice. That motion concerning the legal malpractice claim was granted.

In a separate motion (Doc.63), Mr. Kutcher and Ms. Tygier argued there was no legal malpractice because Mr. Farrugia had not malpracticed because Dr. Hartz's Title VII claims lacked merit. That separate motion was denied.[7]

Dr. Hartz appealed the grant of summary judgment dismissing her legal malpractice claim against Mr. Kutcher and Ms. Tygier.

Mr. Kutcher and Ms. Tygier did not file a cross-appeal concerning their motion, which was denied, premised on the argument that Dr. Hartz's Title VII claims lacked merit.

In granting summary judgment dismissing the legal malpractice claim against Mr. Kutcher and Ms. Tygier, the district court stated "nothing in the record" suggests that:

> [Mr. Kutcher or Ms. Tygier] agreed to counsel Hartz regarding the filing of an EEOC charge, an undertaking that likely would have led the Chopin Defendants to discover that the filing deadline had lapsed, and

[7] Mr. Kutcher and Ms. Tygier offered no competent summary judgment evidence concerning the Title VII claims. Mr. Kutcher and Ms. Tygier did not offer a single affidavit or deposition testimony from anyone from Tulane. Tulane never articulated a reason, if any existed, for its adverse employment actions against Dr. Hartz.

> therefore would have triggered a duty to inform Hartz about a potential malpractice claim against Farrugia.

The district court stated an inquiry by Dr. Hartz about the EEOC charge "would have triggered a duty to inform [Dr.] Hartz about a potential malpractice claim against Farrugia."[8]

In affirming the district court's judgment, the Fifth Circuit Court of Appeals overlooked factual disputes concerning the scope of representation and duties owed to Dr. Hartz by Mr. Kutcher and Ms. Tygier and whether they caused Dr. Hartz to lose her legal malpractice claim against Mr. Farrugia. Although, on appeal, Dr. Hartz, demonstrated that the district court had ignored material facts, misconstrued material facts, had impermissibly construed the facts in the light most favorable to the movants, Mr. Kutcher and Ms. Tygier, and had drawn inferences in their favor, the Fifth Circuit affirmed dismissal of the legal malpractice claim asserted against Mr. Kutcher and Ms. Tygier without reasons for its decision.

This Court directs that the party seeking summary judgment must demonstrate its entitlement to judgment as a matter of law and that no genuine issue of material fact exists by showing that there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317,

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[8] App. 15-16, R.1672 (Doc.114), p.15 n.6.

325, 106 S.Ct. 2548, 2553 (1986). This Court directs that when deciding a motion for summary judgment a court must draw all justifiable inferences in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986). In its affirmance of the district court's summary judgment dismissing Dr. Hartz's legal malpractice claim the Fifth Circuit Court of Appeals sanctioned such a departure by the district court from the accepted course of judicial proceedings as to call for an exercise of this Court's supervisory power.

ARGUMENT

A claim for legal malpractice is stated under Louisiana law, where there is: 1) an attorney-client relationship, 2) the attorney was negligent in his representation of the client, and 3) this negligence caused the client some loss. An attorney is negligent in handling a case if he fails "to exercise at least that degree of care, skill and diligence which is exercised by prudent practicing attorneys in his locality." *Ramp v. St. Paul Fire and Marine Ins. Co.*, 263 La. 774, 269 So.2d 239 (La. 1972). An attorney is negligent if he accepts employment and causes the loss of opportunity to assert a claim for recovery. *Jenkins v. St. Paul Fire and Marine Ins. Co.*, 422 So.2d 1109 (La. 1982).

I. There Are Factual Disputes Concerning The Scope Of Representation, And Duties Owed

The district court "ignored" material facts. Specifically, the district court ignored the denial of tenure letters from Tulane which Mr. Kutcher and Ms. Tygier reviewed, the EEOC letter which raised an inquiry about filing an EEOC charge, Dr. Hartz's deposition testimony, contemporaneous e-mails where Dr. Hartz discussed her concerns about filing an EEOC charge and Mr. Kutcher and Ms. Tygier's representation, and the fact that there was no express limitation on Mr. Kutcher and Ms. Tygier's representation of Dr. Hartz.

The district court stated, "The only email in the record is a transmittal of the Smith letter from Tygier to Hartz." The district court ignored Dr. Hartz's e-mails dated 6/6/2003, 6/12/2003, and 6/30/2003 which were in the record. The district court stated, "Hartz confirmed at her deposition that the only documents that she possessed regarding her representation by the Chopin Defendants were their bills (Hartz depo at 244)." The district court misconstrued this fact.

What Dr. Hartz's testimony at page 244 actually states is: she has no document *to or from the* [*Mr. Kutcher and Ms. Tygier*] *defendants* other than the bills they sent and the checks she wrote to them. However, at her deposition, she discussed the three contemporaneous e-mails written by her concerning

Mr. Kutcher and Ms. Tygier's representation. Her testimony and e-mails were contained in the record at 1371, 1513, 1701, 1703, 1705, and Dr. Hartz testified about them at her deposition, in the record at 962, 963. Dr. Hartz noted these facts in her opposition to summary judgment.

The district court misconstrued the representation of Dr. Hartz by Mr. Kutcher and Ms. Tygier as "Tenure Negotiations." Having ignored specific facts which show Mr. Kutcher and Ms. Tygier's broad scope of representation, the district court concluded that there was a limited scope of representation encompassing only "tenure negotiations" with Tulane and reviewing and revising a letter which had nothing to do with the EEOC. The district court ignored Dr. Hartz's deposition testimony. She testified,

> " . . . I want them for my help with my dispute with Tulane. I didn't go to them for tenure negotiations." (Deposition at page 254, 255.)

The district court also ignored the fact that there were never any "tenure negotiations." Dr. Hartz's 6/30/2003 e-mail corroborates this fact. That 6/30/2003 e-mail discusses that Ms. Tygier informed Dr. Hartz that Mr. Beal, Tulane School of Medicine's In-house Counsel, said "*there is no bargaining . . . period*", i.e., tenure negotiations.

The district court also stated that Mr. Tygier's reviewing and revising a letter had nothing to do with

the EEOC. The district court ignored Ms. Tygier's individual entries on her billing statement. Those billing entries are:

> 6/24/2003 revision of EEOC letter
>
> 6/25/2003 Review and revision of letter to EEOC
>
> 6/30/2003 Phone call from Client regarding letters.

Ms. Tygier's billing entries have nothing to do with tenure negotiations – and everything to do with preparing a letter for Dr. Hartz to assist her when she would file her EEOC charge.

On 7/16/2003 Ms. Tygier's billing record reflects Ms. Tygier and Dr. Hartz discussing the "status" of the dispute with Tulane. Dr. Hartz testified Ms. Tygier advised "just go back to [Mr. Farrugia]."[9] The last entry on the Chopin billing statement, 7/16/2003, states: hold off while other counsel, Farrugia negotiates. The entry reflects that the Chopin defendants did not know whether Dr. Hartz would follow their advice.

The district court drew an inference that Dr. Hartz returned to Mr. Farrugia for representation because of a money issue rather than because of advice she received from Ms. Tygier. Ignoring Dr. Hartz's testimony, the district court stated, "Hartz

[9] R.913, 979-980 (Doc.74) Exh.A, Hartz Dep. pp.254, 255.

did in fact continue with Farrugia, in part because she had already paid him a significant retainer. (*Id.* [Hartz deposition] at 266)."[10] In fact, page 266 of Dr. Hartz's deposition testimony states:

> (R.983) p.266: [Q.] . . . did you make any other efforts to get any other attorneys?
>
> [A.] I did not at that point, no, I kept Mr. Farrugia. It was too –
>
> [Q.] Because you didn't want to spend additional money?
>
> [A.] Well, if I had to get the money, I would have taken out a loan.

Pages 254-255 of Dr. Hartz's testimony states:

> [Q.] Phone call from client regarding status, second call, hold off while other counsel Farrugia negotiates. . . .
>
> [A.] I did not tell them to hold off. They told me to hold off.
>
> [Q.] Did you pay this bill?
>
> [A.] Yes, I paid this bill, but it doesn't say I told them to hold off. Phone call from client regarding status, semi-colon, second call, hold off while other counsel – I didn't say that. They told me that.
>
> [Q.] You're saying that the law firm told you –

[10] App. 14, R.1670 (Doc.114), p.13.

> [A.] I didn't want to deal with Farrugia ever again.
>
> [Q.] So you're saying that the law firm told –
>
> [A.] Well, they didn't say we are not going to represent you. *They just said, hey, Farrugia is doing a fine job, just go back to him* . . . I want them for my help with my dispute with Tulane. I didn't go to them for tenure negotiations (emphasis added).

Contrary to what the district court stated, money played no part in the decision. Dr. Hartz relied on Ms. Tygier's advice and returned to Mr. Farrugia for legal representation, after all, Ms. Tygier told her "*Farrugia is doing a fine job, just go back to him.*" Thereafter, per Mr. Farrugia's counsel, on August 22, 2003, Dr. Hartz filed a charge with the EEOC. Her EEOC charge was filed 400 days after her notice of denial of tenure. The charge was reviewed by the EEOC until March 15, 2006 when the EEOC issued Dr. Hartz a "90 day right to sue" letter.[11]

In addition to ignoring the evidence that Dr. Hartz raised an issue about the EEOC with Ms. Tygier, the district court ignored and/or misconstrued material facts concerning the following: 1) Dr.

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[11] A related suit against Tulane was filed asserting the Title VII denial of tenure claims. The claims were dismissed as timebarred because the EEOC charge was untimely.

Hartz's deposition testimony; 2) Dr. Hartz's contemporaneous e-mails concerning Mr. Kutcher and Ms. Tygier representation; 3) Inconsistencies in Mr. Kutcher and Ms. Tygier's Billing Statements and their Affidavits; 4) Mr. Kutcher and Ms. Tygier's Admission in their Answer, par. 26, which states: "It is admitted that while plaintiff was continuing to be represented by defendant Victor Farrugia, plaintiff sought additional legal counsel from the law firm defendants concerning her dispute with Tulane"; 5) Dr. Hartz's testimony concerning her understanding of Mr. Kutcher and Ms. Tygier's representations – corroborated by the contemporaneous e-mails; 6) The lack of an engagement letter limiting the scope of representation; and 7) Ms. Tygier's review and revision of a letter which concerns: a) time to file EEOC charge, b) multiple uses of letter – sent to EEO, FTFR, EEOC, and c) the language concerning statutory remedies.

The district court also focused on the lack of an engagement letter and construed that fact against Dr. Hartz rather than Mr. Kutcher and Ms. Tygier. Similarly, the district court focused on the lack of a written contract and construed that fact against Dr. Hartz rather than Mr. Kutcher and Ms. Tygier.

The district court also ignored that Ms. Alston, Dr. Hartz's expert, testified that Mr. Kutcher and Ms. Tygier did not comply with the limiting of the scope of representation as required by Rule 1.2 of the Louisiana Rules of Professional Conduct.

The district court erred in granting summary judgment on Dr. Hartz's legal malpractice claim against Mr. Kutcher, Ms. Tygier and Chopin, Wagar, Richard, and Kutcher, LLP. In affirming the district court's judgment, the Fifth Circuit Court of Appeals overlooked that there are factual disputes concerning the scope of representation and duties owed to Dr. Hartz by the movants, Mr. Kutcher and Ms. Tygier.

II. There Are Factual Disputes Concerning Whether Mr. Kutcher And Ms. Tygier Caused A Loss

There were factual disputes about whether Mr. Kutcher and Ms. Tygier were negligent, and whether that negligence caused Dr. Hartz the loss of her claim against Mr. Farrugia.

At page 46 of Appellee's Brief, Mr. Kutcher and Ms. Tygier admitted that the district court "only addressed the Summary Judgment on the scope of representation and duties owed." *In dicta*, the district court discussed the third element of Dr. Hartz's legal malpractice claim in terms of the amount of time such claim remained viable citing *Oyefodun v. Spears*, 669 So.2d 1261 (La.App. 4th Cir. 1996).[12] Ms. Oyefodun was aware of the existence of her medical

[12] App. 17, R 1673. *Oyefodun* has nothing to do with the issue of peremption. The holding in *Oyefodun* addressed application of La. Civil Code article 3463 concerning the interruption of prescription. Unlike prescription, peremption may not be interrupted.

malpractice claim. Such claim was why she sought legal representation from Mr. Spears. After Mr. Spear's withdrawal, Ms. Oyefodun's medical malpractice claim prescribed.

In stark contrast, Dr. Hartz *was unaware* that the EEOC charge filing period had elapsed by June 2003 when she sought Mr. Kutcher and Ms. Tygier's legal advice. Because Dr. Hartz relied on their advice, *she did not learn and she remained unaware* that the EEOC charge filing period had elapsed by June 2003 when she sought Mr. Kutcher and Ms. Tygier's legal advice and of the existence of a legal malpractice claim against Mr. Farrugia (with prescriptive/ peremptive dates).

Because Dr. Hartz *was unaware* of the existence of a claim against Mr. Farrugia, the focus should not be on how much time remained before the legal malpractice claim against Mr. Farrugia became prescribed/ perempted, because between August 22, 2003 and March 15, 2006 the charge was under review by the EEOC. Whether Mr. Kutcher and Ms. Tygier's negligence was the cause-in-fact of the plaintiff's loss is not resolved simply by focusing on how long that claim against Mr. Farrugia remained viable.

This lack of knowledge of the existence of a legal malpractice claim against Mr. Farrugia distinguishes Dr. Hartz from the plaintiff in *Oyefodun,* and makes her situation analogous to the plaintiff's situation in *Federal Sav. v. McGinnis, Juban, Bevan et al.*, 808 F.Supp. 1263, 1269 (E.D. La. 1992). In that case the

FDIC, as receiver of a failed bank (Sun Belt), brought suit against Sun Belt's former attorney alleging legal malpractice in connection with closing on a loan. FDIC/Sun Belt alleged that the attorney's duty was more than merely performing title search, preparing documents, and closing the transaction. FDIC/Sun Belt alleged the attorney's professional duties extended further and required him to advise it concerning all relevant legal matters affecting the transaction and to otherwise protect the bank's interests in the deal. *Id.* at 1266. FDIC/Sun Belt contended that had the attorney not committed legal malpractice while acting as the closing attorney, the bank would have learned information that would have led it to take other action. *Id.* FDIC/Sun Belt alleged it relied on the attorney's advice, did not learn certain facts, and therefore suffered injury. *Id.* The scope of the representation was disputed as there was "no record evidence" that the client had expressly agreed to a contractually limited scope of representation. *Id.* at 1269. There were fact issues about whether defendant-attorneys were negligent, and if there was negligence, whether that negligence caused Sun Belt any injury. Because there was "no record evidence" that the parties agreed to a limited representation, there were factual disputes, and Judge Feldman denied summary judgment.

Similar to *Federal Savings*, here there was no express limitation on the representation. In the context of a denial of tenure based on complaints of sex discrimination and retaliation for previous Title

VII protected activity, Dr. Hartz relied on Mr. Kutcher and Ms. Tygier's advice. Although she relied on their advice, Dr. Hartz did not learn that the EEOC charge filing period had already elapsed when she sought Mr. Kutcher and Ms. Tygier's counsel and of the legal malpractice claim existing against Mr. Farrugia and the time periods within which such a claim must be made. This lack of knowledge caused Dr. Hartz to lose her opportunity to proceed with her claim of legal malpractice against Mr. Farrugia (for his failure to timely file (and/or advise Dr. Hartz to timely file) an EEOC charge within 300 days of her notice of denial of tenure).

In opposing summary judgment, Dr. Hartz posed the inquiry as to whether she lost her right to bring a legal malpractice claim against Mr. Farrugia because of Mr. Kutcher and Ms. Tygier's negligence or irrespective of their negligence. Dr. Hartz argued had they armed her with the knowledge of the existence of such a claim against Mr. Farrugia and the deadlines for filing such claim, their action would have prevented the loss of her legal malpractice claim against Mr. Farrugia. Mr. Kutcher and Ms. Tygier's negligence was therefore a "cause in fact" of the loss of the right to proceed against Mr. Farrugia.

In contrast, Dr. Hartz made no allegation that she lost her right to bring Title VII claims against Tulane because of Mr. Kutcher and Ms. Tygier's negligence as such claims were timebarred when Dr. Hartz engaged Mr. Kutcher and Ms. Tygier. Nonetheless, the district court stated that regarding

the claim of legal malpractice against Mr. Kutcher and Ms. Tygier the "underlying claim" was not merely Mr. Farrugia's legal malpractice but also Dr. Hartz's Title VII claims against Tulane.

The district court erred in determining that the "underlying claim" was both Mr. Farrugia's legal malpractice and also Dr. Hartz's Title VII claims against Tulane, which were timebarred before Dr. Hartz engaged Mr. Kutcher and Ms. Tygier to represent her in her dispute with Tulane. The district court ignored that Dr. Hartz made no allegation that she lost her right to bring Title VII claims against Tulane because of Mr. Kutcher and Ms. Tygier's negligence.

An attorney's negligence is a "cause in fact" of harm to a client if the harm would not have occurred except for that negligence. If the harm would have occurred irrespective of such negligence, then that negligence is not a cause in fact. *Meyers v. Imperial Cas. Idem. Co.*, 451 So.2d 649, 654 (La.App. 3rd Cir. 1984). The proper method of determining whether an attorney's malpractice is a cause in fact of damage to his client is whether the performance of that act would have prevented the damage. *Ault v. Bradley*, 564 So.2d 374, 376, 379 (La.App. 1st Cir. 1990), *writ denied*, 569 So.2d 967 (La.App. 1st Cir. 1990). *See Federal Sav. v. McGinnis, Juban, Bevan et al.*, *supra* at 1268-69.

The inquiry is whether Dr. Hartz lost her right to bring Title VII claims against Tulane and TUHC

because of Mr. Kutcher and Ms. Tygier's negligence or irrespective of their negligence. Mr. Kutcher and Ms. Tygier cannot be faulted for the loss of the right to proceed with the Title VII claims against Tulane because those claims were timebarred by the time Dr. Hartz sought their counsel. Mr. Kutcher and Ms. Tygier's negligence was not a "cause in fact" of Dr. Hartz's loss of her right to proceed against Tulane and TUHC with her Title VII claims. *Meyers*, *supra*, *Ault*, *supra*, and *Federal Sav.*, *supra*. Therefore the Title VII claims form no part of the "underlying claim" with respect to her legal malpractice claim against Mr. Kutcher and Ms. Tygier.

The other inquiry is whether Dr. Hartz lost her right to bring a legal malpractice claim against Mr. Farrugia because of Mr. Kutcher and Ms. Tygier's negligence or irrespective of their negligence. With respect to Dr. Hartz's legal malpractice claim against Mr. Kutcher and Ms. Tygier, she faults them for the loss of her right to proceed with a legal malpractice claim against Mr. Farrugia. Because Mr. Kutcher and Ms. Tygier's failure to inform Dr. Hartz of the legal malpractice claim she had against Mr. Farrugia, and the time periods within which such a claim must be made, she did not learn of Mr. Farrugia's negligence within the time period allowed for bringing a claim against him regarding the EEOC charge issue (Title

VII claims).[13] Thus had they armed her with the knowledge of such a claim against Mr. Farrugia and the deadlines for filing such claim, their action would have prevented the loss of her legal malpractice claim against Mr. Farrugia. Mr. Kutcher and Ms. Tygier's negligence was therefore a "cause in fact" of the loss of the right to proceed against Mr. Farrugia.

Because Mr. Kutcher and Ms. Tygier can only be faulted for the loss of the right to proceed with a claim against Mr. Farrugia, under the authorities cited above, with respect to her legal malpractice claim against Mr. Kutcher and Ms. Tygier, the "underlying claim" is limited to the loss of her right to proceed with a legal malpractice claim against Mr. Farrugia.

Additionally, *in dicta,* the district court stated Dr. Hartz could not have "proved" her Title VII claim by relying solely on a *prima facie* case of discrimination.[14] However, under *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2106, 2009-12, 147 L.Ed.2d 105 (2000), calling into question the defendant's reason for its action, together with a *prima facie* case is sufficient to prove pretext. "[T]he inference of discrimination remains – unless it is conclusively demonstrated, by evidence the district court is required to credit on a motion for

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[13] R.25-28, Complaint par.29, 30, 31(2), 33, 36. R.913, 977, 979-984, 1005-06, Hartz Dep. pp.242-243, 251-252, 254, 255-266, 270-272, 356-359, 361.

[14] App. 7 n.4.

judgment as a matter of law . . . that discrimination could not have been the defendant's true motivation."

Moreover, Dr. Hartz did not solely rely on a *prima facie* case of discrimination. In fact, Dr. Hartz also provided evidence of pretext. In her Opposition Memorandum to Summary Judgment (Doc.74) she offered affidavits of Dr. Talano, Dr. Swain, and Dr. Hallett.

Dr. Talano, Cleveland Clinic (former Chair Tulane Cardiology Department), testified her surgical results were similar to the male surgeons, but Dr. Hartz, the only female surgeon, nationally recognized prior to joining Tulane faculty, "was singled out and made a scapegoat for the system problems at TUHC. She was singled out because she is a female. . . ."[15]

Dr. Swain, FDA cardiac surgeon consultant, testified, "There appeared to be unacceptable results in the Tulane system, and one person, Dr. Hartz, the only female, was singled out and blamed for the system problems."[16]

Dr. Hallett, former member Tulane Cardiology Department, testified Dr. Hartz, "was blamed or scapegoated for Tulane's longstanding problems. Male cardiac surgeons at Tulane had similar, or worse surgical results. None of the male surgeons with similar,

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[15] Dr. Talano's Affidavit (Doc.74), Exh.G, R.1154-1160.

[16] Dr. Swain's Affidavit, Exh.I, 1169-1173.

or worse surgical results, were asked to relinquish their cardiac privileges."[17]

In urging summary judgment, Mr. Kutcher and Ms. Tygier argued Dr. Hartz could not make out a *prima facie* case because she was not qualified for tenure at Tulane. However, that decision was not for Mr. Kutcher and Ms. Tygier to make. Tulane Medical School's P & H Committee had decided Dr. Hartz was qualified for tenure.[18]

Mr. Kutcher and Ms. Tygier did not assert she had no evidence of pretext until their Reply Memorandum. They waited until after the summary judgment deadline had elapsed when they raised such an issue. After defendants' asserted pretext with regard to discrimination in their Reply Memorandum, Dr. Hartz responded in her Objection and Surrebuttal Memoranda.[19] Whether the Fifth Circuit considered Mr. Kutcher and Ms. Tygier's arguments about the Title VII claims cannot be determined as their reasons for affirming the district court decision were not disclosed.

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[17] Dr. Hallett's Affidavit (Doc.74), Exh H, R.1161-1168, R.1326 (Doc.87 & 89), R.1225 & 1327.

[18] P & H Member, Dr. Kadowitz's Affidavit (Doc.74), Exh.J, R.1174-1177.

[19] R.1429-1484, (3/9/09) Leave To File; Objection and Surrebuttal Memorandum to three (3) reply memoranda by Defendants. 3/12/09 leave to file (granted) R.1541, 1543, 1545. R.1733-1749 (Surrebuttal and Objection), R.1719-1731 (Surrebuttal), 1733-1749 (Surrebuttal).

Nonetheless, as no cross-appeal was filed, Mr. Kutcher and Ms. Tygier's arguments concerning Dr. Hartz's Title VII claims should not have been considered by the Fifth Circuit Court of Appeals because those issues were not properly before the Fifth Circuit Court. *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479, 119 S.Ct. 1430, 143 L.Ed.2d 635 (1999). *Positive Black Talk Inc. v. Cash Money Records*, 394 F.3d 357, 365 n.5 (5th Cir. 2004). Dr. Hartz objected to their raising such argument on appeal.[20]

Mr. Kutcher and Ms. Tygier's assertion that Dr. Hartz's time-barred Title VII discrimination and retaliation claims were meritless, was not asserted in support of their Motion For Summary Judgment on the legal malpractice claim (Doc.65). That purported "ground" was asserted solely in support of their separate Motion For Summary Judgment (Doc.63) concerning the Title VII claims, which was denied and which they did not appeal.

In addition to not appealing the denial of their separate Motion For Summary Judgment (Doc.63) concerning the Title VII claims, Mr. Kutcher and Ms. Tygier offered no competent summary judgment evidence concerning the Title VII claims. They offered no deposition testimony or affidavit from anyone who

[20] Hartz Reply Brief pages 11-28, and without waiving such objection, addressed their arguments with the evidence of pretext she had offered the district court in opposing summary judgment.

represented Tulane. It is unknown what Tulane might have asserted. Because the EEOC charge was untimely, Tulane was never required and never provided a reason for its decision not to grant tenure to Dr. Hartz. Tulane never filed an answer and was dismissed on a 12(b)(6) after asserting Dr. Hartz's claims were timebarred because no timely EEOC charge was filed. When Tulane's EFC rejected the tenure recommendation, it gave *no* reason (R.1130-31).

Nonetheless, Mr. Kutcher and Ms. Tygier's speculations about what Tulane might have stated as its reasons for denying Dr. Hartz tenure are meritless and unsupported by summary judgment evidence. More importantly, Defendants were never Dr. Hartz's employer. It is ridiculous for them to state that they "speak" for Tulane. The employer's motivation is for the factfinder to decide. *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2106, 2009-12. Tulane's motivation is unknown.

In contrast, Dr. Hartz's evidence was sufficient for a jury to have found that Tulane denied Dr. Hartz tenure based on her sex. The district court erred in stating Dr. Hartz had to show more than a *prima facie* case of tenure denial and also had to show pretext despite the fact that her employer, Tulane, had never articulated a reason. After establishing a *prima facie* case of tenure denial, Dr. Hartz's inference of discrimination remained and in this case was unrebutted as her employer, Tulane, never articulated a reason for its adverse employment decision.

More importantly, Dr. Hartz's Title VII claims were not the underlying claim for Mr. Kutcher and Ms. Tygier's legal malpractice. The underlying claim for Mr. Kutcher and Ms. Tygier's legal malpractice was Mr. Farrugia's legal malpractice about which they failed to advise her.

Finally, regarding the underlying claim, Louisiana has modified the "case within a case" standard of proof in a legal malpractice claim. *Jenkins v. St. Paul Fire and Marine Ins. Co.*, *supra*, at 1110. The legal malpractice plaintiff is not required to "prove" the underlying claim as that would impose "too great a standard of certainty of proof." *Id.* Where the attorney has been negligent, the burden is shifted to the attorney to show that the plaintiff could not possibly have prevailed in the underlying claim. *Id.* at 1109. Nonetheless, the district court further erred in stating that Louisiana law requires a "case within a case" proof of a legal malpractice claim.[21]

In affirming the district court's judgment, the Fifth Circuit Court of Appeals overlooked that there are factual disputes about whether Mr. Kutcher and Ms. Tygier caused Dr. Hartz to lose her legal malpractice claim against Mr. Farrugia.

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[21] App. 7, R.1662 (Doc.114) p.5 n.4.

CONCLUSION

The district court erred in granting Mr. Kutcher, Ms. Tygier, and Chopin, Wagar, Richard & Kutcher LLP's Motion For Summary Judgment dismissing Dr. Hartz's claim of legal malpractice against them. The district court further erred in deciding the "underlying claim" was not merely Mr. Farrugia's legal malpractice but also Dr. Hartz's timebarred Title VII claims asserted in related litigation.

The Fifth Circuit affirmed without reasons. In so doing the Fifth Circuit sanctioned such a departure from the accepted course of judicial proceedings by the district court as to call for an exercise of this Honorable Court's supervisory power.

The decisions below require an exercise of this Honorable Court's supervisory powers to remedy this sanctioned departure from the usual course of judicial proceedings. This Honorable Court should grant certiorari and reverse the decision below.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-30358

RENEE S. HARTZ, M.D.,

Plaintiff-Appellant,

versus

VICTOR R. FARRUGIA; ROBERT A. KUTCHER; NICOLE TYGIER; CHOPIN, WAGAR, RICHARD & KUTCHER, LLP,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
No. 2:06-CV-3164

(Filed Jan. 11, 2010)

Before JONES, Chief Judge, SMITH and ELROD, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Renee Hartz sues for legal malpractice stemming from the allegedly actionable failure of one of her attorneys to inform her of a potential claim against her former lawyer. The district court granted summary judgment for defendants and denied summary judgment for Hartz.

We have reviewed the briefs, the applicable law, and pertinent portions of the record and have heard the arguments of counsel. Because there is no reversible error, the judgment is AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RENEE S. HARTZ, M.D.	CIVIL ACTION
VERSUS	NO: 06-3164
VICTOR R. FARRUGIA, ROBERT A. KUTCHER, NICOLE TYGIER, CHOPIN, WAGER, RICHARD & KUTCHER, LLP	SECTION: "A" (5)

ORDER AND REASONS

Before the Court are the following motions: **Motion for Summary Judgment (underlying claim) (Rec. Doc. 63), Motion for Summary Judgment (malpractice claim) (Rec. Doc. 65), Motion to Strike Plaintiff's Opposition to Defendants' Motions for Summary Judgment (Rec. Doc. 91)** filed by defendants Robert A. Kutcher, Nicole Tygier, & Chopin, Wagar, Richard & Kutcher LLP; **Motion for Summary Judgment (Rec. Doc. 68), Motion to Exclude the Testimony of Lelise J. Schiff (Rec. Doc. 69)** filed by plaintiff Renee S. Hartz, M.D. ("Hartz"). All motions are opposed. The motions, set for hearing on March 4, 2009, are before the Court on the briefs without oral argument.[1] For the reasons

[1] The motion to strike is set for hearing on the April 1, 2009, hearing date.

Defendants have requested oral argument but the Court is not persuaded that oral argument is necessary to resolve the issues presented.

that follow, the Motion for Summary Judgment (malpractice claim) is GRANTED and the remainder of the motions are DENIED.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 8, 2006, Hartz filed Civil Action 06-2977 in this Court against The Administrators of the Tulane Educational Fund ("Tulane"), and University Healthcare System, LC d/b/a Tulane University Hospital and Clinic ("TUHC") claiming sexual discrimination and retaliation. Hartz, a thoracic surgeon, had been employed at Tulane's School of Medicine as a Professor of Surgery until June 30, 2003, when she was terminated after twice being denied tenure. Hartz alleged that she had been the victim of sexual discrimination, including being subjected to a hostile work environment, that began within four months of her arrival at Tulane in July 1997. According to Hartz, the discrimination had culminated with the second denial of tenure that ultimately led to her termination. Civil Action 06-2977 was filed on behalf of Hartz by attorney Roger D. Phipps who began representing Hartz on or about June 1, 2006, and continues to represent her at present.

On March 26, 2003, Hartz had retained Victor R. Farrugia, an attorney at law, to represent her in conjunction with the second denial of tenure. (Rec. Doc. 63, Exh. 10, Representation Agreement). Plaintiff had first received notice that she was being

denied tenure on June 21, 2002, which means that she had 300 days from that date, or until April 17, 2003, to file her charge of discrimination with the EEOC, or possibly as late as May 12, 2003.[2] Hartz did not file an EEOC charge until August 22, 2003 and as a result her Title VII claims against Tulane (and TUHC) were ultimately found to be time-barred. *Hartz v. Admin. of Tulane Educ. Fund,* No. 07-30506, 2008 WL 1766886 (5th Cir. Apr. 16, 2008) (unpublished). As part of the case sub judice, Hartz sued Farrugia for legal malpractice alleging that he did not advise her to file the EEOC charge when she received notice of the denial of tenure and that it was due to his negligent representation that she waited until August 2003 – after she had actually been terminated – to file the charge. (Rec. Doc. 63, Exh. 11, EEOC charge). Unfortunately, Hartz did not learn of Farrugia's omission regarding the EEOC charge until after the strict permemptive [sic] periods imposed on claims for attorney malpractice under Louisiana law had already run. *See* La. R.S. § 9:5605. Consequently, the Court dismissed those claims on July 18, 2008, as

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[2] Hartz was first notified on June 21, 2002, of the adverse tenure decision but the matter was considered a second time and Hartz was notified on or about July 16, 2002, of the second adverse decision. When Civil Action 06-2977 was before the Fifth Circuit on interlocutory appeal, the court declined to decide whether the Title VII limitations period began running with the first notice or with the second notice because either way Hartz's EEOC charge was untimely. *Hartz v. Admin. of Tulane Educ. Fund,* No. 07-30506, 2008 WL 1766886, at *8 n.2 (5th Cir. Apr. 16, 2008) (unpublished).

being untimely. (Rec. Doc. 39). Hartz's malpractice claim against Farrugia based on his failure to file a state law discrimination claim, although timely, was dismissed on July 18, 2008, and October 3, 2008, because Tulane is not an "employer" for purposes of Louisiana's anti-discrimination law. (Rec. Docs. 39 & 53). Thus, Farrugia is no longer a party to this lawsuit.

As part of the case sub judice, Hartz also sued attorneys Robert A. Kutcher, Nicole Tygier, and the law firm of Chopin, Wagar, Richard & Kutcher, LLP (collectively "the Chopin Defendants") alleging that they failed to inform her that Farrugia might have been negligent regarding the timing of the EEOC charge. Hartz had consulted with these attorneys on July 16, 2003, and she blames them for losing her rights to proceed against Farrugia on the legal malpractice claim related to the untimely EEOC charge.[3] As the case now stands, the sole remaining claim to be tried is Hartz's claim that the Chopin Defendants are liable for failing to advise her of a potential legal

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[3] Hartz had also sued the Chopin Defendants for failing to inform her about her rights under state law. This claim was dismissed on October 6, 2008, for the same reasons that the claim was dismissed against Farrugia, *i.e.*, that Hartz never had a claim under state law because Tulane does not satisfy the definition of an "employer." (Rec. Doc. 54). In that same ruling the Court noted that Hartz never had a claim against the Chopin Defendants for failing to file a timely EEOC charge because the filing deadline had already passed by the time that Hartz consulted with them. (Rec. Doc. 54).

malpractice claim against Farrugia for his failure to timely file an EEOC charge. This claim is set to be tried to the Court sitting without a jury on April 20, 2009.

The Chopin Defendants now move for summary judgment on the underlying claim and on the legal malpractice claim. As to the underlying claim, the Chopin Defendants argue that Hartz's discrimination claims against Tulane had no merit and therefore she could not have recovered against Farrugia for failing to pursue such a claim.[4] As to the legal malpractice claim, the Chopin Defendants argue that their representation of Hartz was very specific and limited

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[4] In legal malpractice cases Louisiana has traditionally employed a "case within a case" requirement such that the plaintiff must prove not only that the attorney was negligent in handling his client's claim but also that the underlying claim would have been successful but for the attorney's omission. *See Jenkins v. St. Paul Fire & Marine Insurance Co.*, 422 So. 2d 1109 (La. 1982).

Contrary to Hartz's contentions, the underlying claim in this case is not limited to the malpractice suit against Farrugia but rather additionally includes the discrimination claims against Tulane. The calculations for earning loss contained in Hartz's economist's report clearly indicate that the damages she seeks to recover in this case are directly related to her loss of tenure at Tulane, (Rec. Doc. 74, Exh. D, Dalton Report), and the only way that she can recover damages on that basis is if Tulane *unlawfully* denied her tenure. Likewise contrary to Hartz's contentions, she cannot carry her burden on the discrimination claims by relying solely on a prima facie case of discrimination, assuming *arguendo* that under these facts she has established a prima facie case.

in scope and that they had no duty to render any advice or opinion to Hartz regarding any potential legal malpractice by Farrugia.

Hartz also moves for summary judgment arguing that she is entitled to judgment as a matter of law on the legal malpractice claim against the Chopin Defendants.

II. DISCUSSION

The threshold question presented by all three motions for summary judgment, and in particular the Chopin Defendants' motion for summary judgment on the legal malpractice claim, is whether the Chopin Defendants had a duty to inform Hartz regarding any potential legal malpractice by Farrugia. In the absence of any such duty, Hartz has no legal malpractice claim against the Chopin Defendants.

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," when viewed in the light most favorable to the non-movant, "show that there is no genuine issue as to any material fact." *TIG Ins. Co. v. Sedgwick James*, 276 F.3d 754, 759 (5th Cir. 2002) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* (citing *Anderson*, 477 U.S. at 248). The court must draw all justifiable inferences in favor of the non-moving party. *Id.* (citing

Anderson, 477 U.S. at 255). Once the moving party has initially shown "that there is an absence of evidence to support the non-moving party's cause," *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), the non-movant must come forward with "specific facts" showing a genuine factual issue for trial. *Id.* (citing Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986)). Conclusional allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation do not adequately substitute for specific facts showing a genuine issue for trial. *Id.* (citing *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1993)).

In order to establish a claim for legal malpractice, a plaintiff must prove 1) the existence of an attorney-client relationship, 2) negligent representation by the attorney, and 3) loss caused by that negligence. *Teague v. St. Paul Fire & Marine Ins. Co.*, 974 So. 2d 1266, 1272 (La. 2008) (citing *Costello v. Hardy*, 864 So. 2d 129, 138 (La. 2004)). A failure to act will give rise to civil liability only if it occurs within the context of a duty to act. *Lifemark Hosp., Inc. v. Jones, Walker, Waechter, Poitevent, Carrere & Denegre*, No. 94-1258, 1997 WL 33473806, at *5 (E.D. La. Nov. 13, 1997) (Fallon, J.). In the case of legal malpractice duty is defined by the attorney-client relationship. *Id.* (citing *Grand Isle Campsites, Inc. v. Cheek*, 262 So. 2d 350 (La. 1972); *Delta Equip. & Constr. Co. v. Royal Indem. Co.*, 186 So. 2d 454 (La. App. 1st Cir. 1966)). The attorney-client relationship is "purely contractual" and results only from "the mutual agreement

and understanding of the parties concerned." *Id.* (quoting *Delta Equip.*, 186 So. 2d at 458). "Such a relationship is based only upon the clear and express agreement of the parties as to the nature of the work to be undertaken by the attorney and the compensation which the client agrees to pay therefore." *Id.* "Authorization to represent a client in connection with a specific legal matter does not imply authorization to handle all others, nor does the agreement or consent of an attorney to represent a [ ] client in a particular matter create an attorney-client relationship as regards other business or affairs of the client." *Id.*

The foregoing rules are elucidated by the outcome in *Buras v. Marx,* 892 So. 2d 83 (La. App. 5th Cir. 2004). In *Buras,* the plaintiff sued his former attorneys for failing to file a legal malpractice claim against the plaintiff's original attorney who had mishandled a matter. The defendant attorneys had continued to represent the plaintiff in other aspects of the case but they maintained that they had specifically told the plaintiff that they would not file a legal malpractice claim on his behalf. The defendant attorneys did not inform the plaintiff of the pending prescription dates and the legal malpractice claim against the original attorney prescribed. The trial court concluded, as did the appellate court, that there was no attorney-client relationship between the plaintiff and defendant as to the malpractice claim against the original attorney. *Id.* at 87. The appellate court also noted that an attorney is not required to

give notice of prescription dates when representation is refused. *Id.* However, the dissent pointed out that the duty to inform a client of pending prescription dates depends on the particular facts surrounding the attorney-client encounter. *Id.* at 87-88 (Daley, J., dissenting). The dissent believed that under the facts that defendant attorneys did in fact have a duty to advise the client of the imminent deadline to file a legal malpractice action. *Id.*

It is undisputed that an attorney-client relationship existed between Hartz and the Chopin Defendants as to at least some part of her dispute with Tulane because the firm provided legal services to Hartz between June 22, 2003, and July 16, 2003. (Rec. Doc. 65, Exh. 4, Billing records). However, cases like *Buras* and *Lifemark*, *supra*, demonstrate that the existence of an attorney-client relationship as to some aspect of the client's case does not necessarily imply that an attorney-client relationship exists as to all aspects of the case. The scope of the relationship is based only upon the clear and express agreement of the parties and whether the Chopin Defendants had a duty to inform Hartz about any malpractice by Farrugia will depend on the particular facts surrounding the attorney-client encounter in this case. The record establishes the following.

Hartz hired Farrugia on March 26, 2003, after months of attempting to navigate internal administrative tenure appeals at Tulane on her own. (Rec. Doc. 63, Exh. 10, Representation Agreement). Hartz became concerned around this time because the

university provost had sent her a letter on March 11, 2003, advising that she would not receive tenure, and her employment was due to terminate in June of that year. (Hartz depo. at 152-54). Hartz testified that she found Farrugia "difficult to get a hold of," and that he urged her to continue pursuing internal remedies at Tulane. (*Id.* at 159). Hartz testified that Farrugia had told her that he was extremely pressed for time, and Hartz felt that Farrugia did not seem to have time for her case. (*Id.* at 187).

Hartz explained that she contacted the Chopin Defendants at the recommendation of an attorney-neighbor who knew defendant Robert Kutcher. (*Id.* at 188). She testified that she sought out the Chopin Defendants because she could not find Farrugia, she had been denied tenure, she was panic stricken, and she needed help.[5] (*Id.* at 252). Hartz did not want to deal with Farrugia any more and she had hoped that the Chopin firm would take her case. *Id.* at 252, 255). On June 22, 2003, Kutcher spoke with Hartz on the phone regarding her ongoing tenure negotiations with Tulane and advised her that she could meet with Nicole Tygier, another partner with the firm, the next day if she wished. (Rec. Doc. 65, Exh. 11, Kutcher affid.). Kutcher had no further contact with Hartz after that conversation. (*Id.*; Hartz depo. at 265).

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[5] Hartz later learned that Farrugia had been out of town on vacation when she was unable to reach him.

On June 23, 2003, Hartz met with Tygier and reviewed some documents that she brought with her. (Rec. Doc. 65, Exh. 11, Tygier affid.). Tygier attests that they discussed Hartz's ongoing problems with tenure negotiations and that Hartz specifically requested assistance in preparing a letter to Ms. Mary Smith who was Tulane's EEO Compliance Officer. (*Id.*). According to Tygier, she revised the letter over the next few days and sent the final draft to Hartz on June 30, 2003, at which time Tygier discussed the letter with her. (*Id.*). Hartz sent the letter to Smith under her own signature and not that of any attorney with the Chopin firm. (Rec. Doc. 65, Exh. 34).

The Smith letter was eight pages of single-spaced text. (Rec. Doc. 65, Exh. 34). The entire representation by the Chopin Defendants, including Kutcher's phone conversation with Hartz, lasted 14.5 hours, the majority of which appears to be time devoted to working on the Smith letter. (Rec. Doc. 65, Exh. 4). The only email in the record is a transmittal of the Smith letter from Tygier to Hartz. (Rec. Doc. 65, Exh. 5).

After June 30, 2003, the date of the Smith letter, the next and final entry in the Chopin Defendants' billing records is dated July 16, 2003, and it states "[p]hone call from client regarding status; second call; hold off while other counsel, Farrugia, negotiates." Rec. Doc. 65, Exh. 4). According to Tygier, Hartz told her not to take any further action because Farrugia would be handling the continuing negotiations with Tulane." (Rec. Doc. 65, Exh. 11). However, Hartz

contends that she did not tell the Chopin Defendants to "hold off" in light of Farrugia but rather the Chopin Defendants told her that they were going to hold off so that Farruiga could continue with the negotiations with Tulane. (Hartz depo. at 254-55). Hartz knew at that point that the Chopin Defendants were refusing her case and that they did not want to represent her. (Hartz depo. at 255, 258, 259).

Hartz confirmed at her deposition that the only documents that she possessed regarding her representation by the Chopin Defendants were their bills. (Hartz depo. at 244). Hartz never gave the Chopin Defendants a retainer and there was never a written contract of representation. (*Id.* at 247, 252).

Hartz did in fact continue with Farrugia, in part because she had already paid him a significant retainer. (*Id.* at 266). In fact, on August 22, 2003, Farrugia accompanied Hartz to the EEOC office to file her charge. Hartz ultimately terminated Farrugia on June 1, 2006, nearly three years later. (*Id.* at 219). It is undisputed that Hartz had no contact whatsoever with the Chopin Defendants after July 16, 2003, when it became clear that they were refusing her case, until she filed this legal malpractice suit against them. (Hartz depo. at 278-79; Rec. Doc. 65, Exh. 11, Kutcher & Tygier affids.).

The Court is persuaded that the particular facts surrounding Hartz's engagement of the Chopin Defendants establishes that they had no duty to inform her of any omissions regarding Farrugia's representation,

and no facts *material* to this determination are in dispute. Although it might have been Hartz's intention and desire that the Chopin Defendants would take over her case when she became dissatisfied with Farrugia's services, there is nothing in the record that even remotely suggests that the Chopin Defendants agreed to such a broad engagement, or that Hartz even subjectively believed that they had taken her case. To the contrary, the record suggests a very narrow rendering of services with respect to the Smith letter, at a time when Hartz continued to be represented by Farrugia, and after the Smith letter was completed no other legal services were rendered. Hartz paid no retainer, instead paying on an hourly basis for legal services rendered, and she never signed a representation agreement as she had done with Farrugia. Hartz does not cite to anything that the Chopin Defendants did to mislead her with respect to the services they would render and her deposition makes clear that she knew that her case was being rejected. The undisputed facts establish that the Chopin Defendants' representation was a narrow one, notwithstanding Hartz's hopes to the contrary. Thus, while an attorney-client relationship undisputedly existed between Hartz and the Chopin Defendants from June 22, 2003, through July 16, 2003, the scope of that relationship clearly did not include all aspects of Hartz's case. As explained above, the scope of the relationship is governed by contract and by the agreement of the parties, and nothing in the record, including Hartz's deposition, suggests that the Chopin Defendants agreed to

counsel Hartz regarding the filing of an EEOC charge, an undertaking that likely would have led the Chopin Defendants to discover that the filing deadline had lapsed, and therefore would have triggered a duty to inform Hartz about a potential malpractice claim against Farrugia.[6] Likewise, nothing in the record suggests that Hartz ever specifically sought the Chopin Defendants' assistance with a legal malpractice claim.

Moreover, there is no evidence that the Chopin Defendants had actual knowledge of a potential legal malpractice claim against Farrugia and nothing on the face of the Smith letter suggests a problem. Hartz had no idea that Farrugia had missed the filing deadline and she made no suggestion to the Chopin Defendants that she suspected a problem with Farrugia's handling of her claim. Thus, in order for the Chopin Defendants to discover Farrugia's omission they would have had to unilaterally investigate a potential malpractice claim on Hartz's behalf. The timeliness of the EEOC charge was not an uncomplicated issue which is why this Court certified its prior ruling to the Fifth Circuit for interlocutory appeal. Given that the Chopin Defendants performed limited legal work for Hartz and declined to take her case they had no

[6] Each side retained an expert to opine on their behalf regarding whether the Chopin Defendants breached a duty owed to Hartz. (Rec. Doc. 65, Exh. 13 & Rec. Doc. 74, Exh. C). The legal issues presented in this case are well within the province of the Court to resolve without the need for expert assistance.

legal obligation to investigate Farrugia's handling of the case.

Finally, Hartz's claim against the Chopin Defendants suffers from the additional infirmity in that the legal malpractice claim against Farrugia did not prescribe until April 2006,[7] which is nearly 2 years and 9 months after the Chopin Defendants terminated their relationship with Hartz on July 16, 2003. In *Oyefodun v. Spears,* the Fourth Circuit upheld a trial court ruling that recognized that an attorney could not be liable for legal malpractice when he withdrew from the case almost a year before the case prescribed. 669 So. 2d 1261 (La. App. 4th Cir. 1996). Similarly, the Chopin Defendants are not responsible for the loss of a claim that prescribed nearly three years after their representation ended.

Accordingly, and for the foregoing reasons;

IT IS ORDERED that the **Motion for Summary Judgment (malpractice claim) (Rec. Doc. 65)** filed by defendants Robert A. Kutcher, Nicole Tygier, & Chopin, Wagar, Richard & Kutcher LLP is **GRANTED**. Plaintiff's complaint is **DISMISSED** with prejudice;

IT IS FURTHER ORDERED that the **Motion for Summary Judgment (underlying claim) (Rec. Doc. 63)** filed by filed by [sic] defendants

[7] Three years after the EEOC charge should have been filed in April 2003.

Robert A. Kutcher, Nicole Tygier, & Chopin, Wagar, Richard & Kutcher LLP is **DENIED** as moot;

IT IS FURTHER ORDERED that the **Motion to Strike Plaintiff's Opposition to Defendants' Motions for Summary Judgment (Rec. Doc. 91)** filed by defendants Robert A. Kutcher, Nicole Tygier, & Chopin, Wagar, Richard & Kutcher LLP is **DENIED;**

IT IS FURTHER ORDERED that the **Motion for Summary Judgment (Rec. Doc. 68)** filed by plaintiff Renee S. Hartz, M.D. is **DENIED;**

IT IS FURTHER ORDERED that the **Motion to Exclude the Testimony of Lelise J. Schiff (Rec. Doc. 69)** filed by plaintiff Renee S. Hartz, M.D. is **DENIED** as moot.

March 31, 2009

/s/ Jay C. Zainey
JAY C. ZAINEY
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RENEE S. HARTZ	CIVIL ACTION
VERSUS	NO: 06-3164
VICTOR R. FARRUGIA, et al	SECTION: "A"

JUDGMENT

For the written reasons of the Court issued July 18, 2008 and October 3, 2008, **IT IS ORDERED, ADJUDGED AND DECREED** that there be judgment in favor of defendant Victor R. Farrugia, and against plaintiff, Renee S. Hartz.

For the written reasons of the Court issued October 6, 2008 and March 31, 2009, **IT IS ORDERED, ADJUDGED AND DECREED** that there be judgment in favor of defendants Robert A. Kutcher, Nicole Tygier and Chopin, Wagar, Richard & Kutcher, LLP.

New Orleans, Louisiana, this 1st day of April 2009.

/s/ Jay C. Zainey
JAY C. ZAINEY
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-30358

RENEE S. HARTZ, M.D.,

Plaintiff-Appellant,

v.

VICTOR R. FARRUGIA; ROBERT A. KUTCHER; NICOLE TYGIER; CHOPIN, WAGAR, RICHARD & KUTCHER, LLP,

Defendants-Appellees.

Appeal from the United States Court for the Eastern District of Louisiana. New Orleans

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ON PETITION FOR REHEARING

(Filed Feb. 09, 2010)

Before JONES, Chief Judge, SMITH and ELROD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is [DENIED].

ENTERED FOR THE COURT:
/s/ Jay Smith
United States Circuit Judge

No. 09-1390

In the Supreme Court of the United States

RENEE S. HARTZ, M.D.,

Petitioner,

v.

VICTOR R. FARRUGIA; ROBERT A. KUTCHER; NICOLE TYGIER; CHOPIN, WAGER, RICHARD & KUTCHER, LLP,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Fifth Circuit's Opinion affirming the District Court's dismissal of Plaintiff's lawsuit based upon Louisiana state law principles does not represent a departure from the accepted and usual course of judicial proceedings, as to call for the exercise of this Court's supervisory power.

II. Whether Petitioner has presented compelling reasons to grant the Petition, where Petitioner contends that the District Court made erroneous factual determinations, which factual determinations were then affirmed by the Fifth Circuit.

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INTRODUCTION

Petitioner has presented no "compelling reasons" for her Petition for Writ of *Certiorari* to be granted. *See* Sup. Ct. R. 10. Specifically, Petitioner fails to demonstrate that the Fifth Circuit's affirmance of the dismissal of Petitioner's legal malpractice lawsuit in any way represents a departure from the accepted and usual course of judicial proceedings, as to call for exercise of this Court's supervisory power. The District Court correctly applied Louisiana state law in dismissing Petitioner's legal malpractice claims, and the District Court's factual determinations and analysis of Louisiana state law do not warrant the exercise of this Court's supervisory power.

Simply put, Petitioner's arguments that both the District Court and the Fifth Circuit misapplied Louisiana state law and made erroneous factual determinations are insufficient to carry Petitioner's burden of demonstrating that there are compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF PROCEDURAL FACTS

This legal malpractice case stems from the underlying case, *Rene S. Hartz v. Administrators of Tulane Educational Fund, University Healthcare System, LLC, et al.*, Civil Action No. 06-2977, USDC, Eastern District of Louisiana (hereinafter the "Tulane Suit"). That lawsuit was filed by Dr. Hartz (through her current counsel, Phipps & Phipps) on or about June 8, 2006. In the Tulane suit, Dr. Hartz contended that Tulane discriminated against her on the basis of

her gender by refusing to grant her tenure and retaliated against her, all in violation of Title VII.

Approximately eight days after Dr. Hartz filed her lawsuit against Tulane, she also filed, on June 16, 2006, a legal malpractice lawsuit against Victor Farrugia, and Robert A. Kutcher, Nicole Tygier, Chopin, Wagar, Richard & Kutcher, LLP (the "Chopin defendants"). In the legal malpractice lawsuit, Dr. Hartz contended that if her employment discrimination suit against Tulane was dismissed as time-barred, then she would have a legal malpractice claim against both Victor Farrugia and the Chopin Wagar defendants. Since some of the legal malpractice claims were dependent upon the outcome of the Tulane discrimination suit, the legal malpractice lawsuit was stayed pending resolution of the Tulane suit.

Counsel for Tulane Medical School and Tulane Hospital filed Motions to Dismiss, contending that the claims were time-barred. Tulane argued that the initial EEOC Complaint, filed by Dr. Hartz (with Victor Farrugia) on August 22, 2003 was too late, as it was not filed within three hundred days of the alleged discriminatory conduct by Tulane. According to Tulane's argument, the EEOC charge needed to be filed by April of 2003, but was not filed until August 22, 2003. In response to this time limits argument, Dr. Hartz argued that there were continuing discriminatory acts on the part of Tulane up and through 2003, as well as retaliatory acts taken by Tulane in 2003, all of which rendered the August of 2003 EEOC charge timely.

The District Court denied Tulane's Motion to Dismiss via an Order and Reasons dated March 20,

2007. Both Tulane Medical School and Tulane Hospital moved for reconsideration of the Court's Ruling, but by Orders dated April 23, 2007 and April 25, 2007, those Motions were denied. However, the District Court did grant Tulane's Motion for Certification under 28 U.S.C. § 1292(b), specifically finding that the timeliness issues before the Court "involved a controlling question of law as to which there is a substantial ground for a difference of opinion." The matter was therefore certified to the United States Fifth Circuit Court of Appeal for interlocutory appeal.

After the appeal was lodged in the U.S. Fifth Circuit Court of Appeal, on April 16, 2008, the Fifth Circuit found that the claims against Tulane were time barred because the EEOC charge did need to be filed by April, 2003. The Fifth Circuit found that Dr. Hartz never had a claim for "de facto tenure", and also held that the Tulane Medical School and Tulane Hospital were two separate and distinct entities. Finally, the Fifth Circuit took the time to criticize Dr. Hartz' counsel, for being unprepared and unprofessional in the oral argument. See *Hartz v. Tulane*, 275 Fed. Appx. 281 (5th Cir. 2008). Dr. Hartz neither requested rehearing, nor took any further appeals.

After the termination of the Tulane lawsuit, Dr. Hartz pursued the legal malpractice suit. Through a series of rulings, the District Court dismissed any and all legal malpractice claims against Victor Farrugia as being time-barred. The Court reasoned that any legal malpractice on the part of Victor Farrugia took place in April of 2003, and therefore the plaintiff had until April of 2006 to file a claim against Victor Farrugia

under Louisiana Revised Statute 9:5605. Since this lawsuit was filed on June 16, 2006, it was filed some two months too late. The Court therefore dismissed all claims against Victor Farrugia, and also dismissed any claims against the Chopin defendants concerning either the alleged failure to timely file a state law legal malpractice case, or any claim that they negligently failed to timely file the EEOC charge.[1]

After the District Court's rulings, the sole remaining claim was that it was legal malpractice for the Chopin defendants not to have advised Dr. Hartz (when she came to see them in June 2003) that she should file a legal malpractice suit against Victor Farrugia. The matter was set for trial before the Honorable Judge Zainey without a jury. After discovery, the Chopin defendants filed two separate Motions for Summary Judgment. In the first Motion, the Chopin defendants demonstrated that as a matter of law, the plaintiff could not prove all the elements required under Louisiana law to state a legal malpractice claim against the Chopin defendants. Trial Record at Volume 1, Pages 436-557. The second Motion demonstrated that the plaintiff's claims against the Chopin defendants failed because Dr. Hartz' underlying claim against Tulane lacked merit. Trial Record at Volume 1, Pages 336-435.

Numerous, lengthy memorandum opposing the two summary judgments were filed by Dr. Hartz, as well

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[1] Since the Fifth Circuit determined that the EEOC charge needed to be filed by April 2003, but Dr. Hartz did not even first contact the Chopin defendants until June 22, 2003, by the time Dr. Hartz even called the Chopin defendants, it was already too late to file an EEOC charge, even if Dr. Hartz had requested same.

as her own Motion for Summary Judgment. The Chopin defendants filed a Motion to Strike some of the pleadings filed by the plaintiff, on the grounds that those pleadings were not timely filed and provided to the Chopin defendants pursuant to court rules. Trial Record at Volume 3, Pages 1406-1414.

The Court considered the numerous, lengthy[2] Briefs submitted by the parties, and on March 31, 2009 issued a Ruling granting the first of the Motions for Summary Judgment filed by the Chopin defendants. Trial Record at Volume 3, Pages 1658-1674. Because the District Court agreed with the Chopin defendants' argument that the plaintiff could not prove the requisite elements of a legal malpractice claim pursuant to Louisiana law, the District Court never reached the alternative basis for summary judgment raised by the Chopin defendants.

On Appeal to the United States Fifth Circuit Court of Appeal, the District Court's dismissal of Petitioner's legal malpractice claim was affirmed. Petitioner filed an application for rehearing before the Fifth Circuit, but that application was denied. This Petition for Writ of Certiorari follows.

STATEMENT OF RELEVANT FACTS

Since the Petitioner's Statement of Facts contains several key misstatements and omissions, the Chopin

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[2] At one point, the District Court denied plaintiff's Motion for Leave to File a Surrebuttal Memorandum in Opposition to the Chopin defendants' Motion for Summary Judgment, on the grounds that the proposed memorandum was too lengthy.

defendants submit the following recitation of relevant facts.

On or about May 8, 1997, Dr. Renee Hartz was hired by Tulane University Medical Center for a faculty position in the Department of Surgery at Tulane University School of Medicine. That letter outlined the job responsibilities Tulane expected Dr. Hartz to fulfill. For example, that letter stated.

> I would expect that you would conduct student teaching and resident teaching in surgery with such adjunctive teaching as might be desirable to you in other areas of the medical school. Furthermore, you will become a Co-Program Director for the training program in cardiothoracic surgery. ... I would expect that you would develop an active clinical practice in adult cardiothoracic surgery. With your expertise and experience in minimally invasive cardiac surgery, I hope that you would be able to establish Tulane as a center for this type of surgery. Your clinical practice would be conducted as a member of the faculty practice plan and that organization's rules and regulations would govern your activities in this regard.

Trial Record at Volume 1, Pages 360-362.

At the time of the hire, Dr. Hartz was informed that the position did not automatically grant tenure, but instead she would be considered for tenure in her first year of employment. Within the first six months of her employment, however, Dr. Hartz lost all cardiac

surgery privileges at the affiliated Tulane Hospital[3], due to concerns about her performance and high mortality rates of her patients. Trial Record at Volume 1, Pages 372; and Trial Record at Volume 1, Pages 424-427. As a result of Dr. Hartz' loss of surgical privileges in the very area for which she was hired, the Tulane Department of Surgery's Promotions Committee recommended that her tenure be placed on hold pending the resolution of her surgical privileges status. Trial Record at Volume 1, Page 424. In particular, in January 1999, the Department Promotions Committee issued a memo, stating that it was unable to make a decision on whether to recommend tenure for Dr. Hartz because of significant concerns regarding Dr. Hartz' clinical qualifications in cardiac surgery. Trial Record at Volume 1, Page 424. Subsequently, on March 15, 1999, the Department Promotions Committee issued another memo, finding unanimously that Dr. Hartz had not met the requirements for tenure. Trial Record at Volume 1, Page 424. The Committees' recommendation was concurred in by the Chair of the Department of Surgery, the School of Medicine, and the Dean of the School of Medicine.

Dr. Hartz filed a variety of internal grievances with Tulane, seeking to have her tenure granted in 1999. One such grievance was filed before a University wide Committee on Faculty, Tenure, Freedom and Responsibility ("FTFR").[4] That Committee

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[3] This Court has found that Tulane Hospital and Tulane Medical School are separate and distinct entities.

[4] Dr. Hartz' Brief recites select portions of that committee's 3/31/00 memo. Interestingly, that same FTFR committee (upon

recommended that Dr. Hartz' probationary period be extended three years.

When those grievances did not accomplish what she was seeking, Dr. Hartz also filed a Notice of Charge with the EEOC in 1999. With regards to that dispute with Tulane and the EEOC charge, Dr. Hartz engaged the services of an attorney by the name of Judy Giorlando, with the Law Firm of Taylor, Wellons, Politz & Duhe. Dr. Hartz' EEOC charge was filed on or about October 14, 1999. In that EEOC charge, Dr. Hartz contended that Tulane had discriminated against her by refusing her tenure, and by restricting her operating privileges. She contended that Tulane discriminated against her because of her female gender. Trial Record at Volume 1, Page 373.

On September 27, 2000, the EEOC issued a letter to Dr. Hartz, advising her that the Commission would be discontinuing its processing of the charge because "evidence obtained during the course of the investigation does not support the allegations made in your charge." Trial Record at Volume 1, Page 374. Dr. Hartz received a dismissal and Notice of Rights Letter from the EEOC, but chose not to file a lawsuit against Tulane. Instead, Dr. Hartz entered into a Compromise Agreement with Tulane, whereby she was put on probation for a period of an additional three years, beginning July 1, 2000. Trial Record at Volume 2, Pages 1121-1122. Again, in agreeing to that probationary period, Tulane made it crystal clear that any future tenure decisions would be reviewed based

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which Hartz places much reliance) later voted against granting her tenure.

upon a variety of factors, including her teaching performance and cardiac surgical privileges. However, it was not until January of 2002 that Dr. Hartz' cardiac surgical privileges at Tulane University Health Center were restored. Trial Record at Volume 1, Page 372. By that time Dr. Hartz' had gone approximately four years without cardiac surgical privileges.

Thereafter, Dr. Hartz was considered for tenure once again. On April 22, 2002, the Department's Promotions Committee voted 2-0 to table any consideration of tenure for Dr. Hartz. Due to the effect this decision would have on the pending agreement, which stated that Dr. Hartz must receive tenure or the 2002-2003 school year would be her last at Tulane, the Dean of the School of Medicine informed the PHC ("PHC") of the situation and recommended against tabling any decision on Dr. Hartz. Accordingly, the Chairman of the Department of Surgery, Dr. Robert Hewitt, submitted Dr. Hartz' tenure package to the PHC with a recommendation of not granting tenure to Dr. Hartz. In his submission to the committee, Dr. Hewitt noted that in addition to the fact that she could not fulfill her teaching duties by having students watch her perform said surgeries, Dr. Hartz had created a deficit in the years she worked in his department (because she could not perform the income earning cardiac surgeries she was hired to conduct), had received zero grant money, and had published very few scholarly articles. Trial Record at Volume 1, Page 376-378.

When Tulane considered Dr. Hartz for tenure, the PHC voted seven to two to recommend tenure to Dr. Hartz. In accordance with the School of Medicine's Constitution, the PHC decision was submitted to the

Executive Faculty Committee for final action. On June 20, 2002, the Executive Faculty Committee comprised of professors representing the different departments of the Medical School, met to review the lower committee's decision, and overwhelmingly rejected it. In a 14 to 2 vote, the Executive Faculty Committee decided that Dr. Hartz was not qualified to receive tenure at Tulane.

Dr. Hartz was notified of the Executive Committee's decision on June 21, 2002. At that time, she was also told that the Faculty Handbook granted her another avenue of relief in that the PHC would be given an opportunity to present additional information to the Executive Faculty in favor of its original decision. If supplemental information was received, the Executive Faculty Committee would vote on Dr. Hartz' tenure package again. On July 15, 2002, the PHC submitted supplemental materials to the Executive Faculty for further consideration in Dr. Hartz' tenure decision. On July 16, 2002, the Executive Faculty Committee convened to discuss the additional information provided. The Executive Faculty voted 18 to 4 to deny tenure to Dr. Hartz. Trial Record at Volume 1, Page 379. The Dean of the Medical School concurred with the Executive Faculty Committee's decision and notified Dr. Hartz of such on July 16, 2002. Dr. Hartz was also reminded that the 2002-2003 academic year would be her terminal year. Trial Record at Volume 1, Page 380

Thereafter, Dr. Hartz decided to file a grievance with Tulane over the decision not to grant her tenure. On December 11, 2002, a grievance committee ruled in her favor. The Dean of Tulane University School of Medicine appealed that decision, and the grievance

committee's ruling in favor of Dr. Hartz was reversed on or about March 19, 2003. Trial Record at Volume 1, Page 381. Dr. Hartz appealed to a committee overseeing tenured decisions, but the decision to deny her tenure was upheld by the FTFR in May of 2003. Trial Record Volume 1, Page 382-384. The FTFR's findings were thereafter accepted by Tulane President, Scott Cowen, and Dr. Hartz was therefore terminated by Tulane affective June 30, 2003.

On March 26, 2003, Dr. Hartz hired an attorney by the name of Victor R. Farrugia to represent her interests. The Retainer Agreement between Dr. Hartz and Mr. Farrugia states that the representation is in the matter of "*Hartz v. Tulane University*". Trial Record at Volume 1, Page 465. Dr. Hartz and Mr. Farrugia signed the Agreement on March 26, 2003. That same day, Mr. Farrugia prepared a letter to a Ms. Mary Smith, who was the Associate Vice President and Equal Opportunity/Affirmative Action Compliance Officer for Tulane University. Trial Record at Volume 1, Page 467-469. In that letter, Mr. Farrugia outlined Dr. Hartz' internal grievances with Tulane.

After Mr. Farrugia's March 26, 2003 engagement, he continued to represent Dr. Hartz, preparing numerous letters and e-mails on her behalf. In mid June of 2003, while Dr. Hartz was still engaged in a grievance procedure before Mary Smith of Tulane University, Dr. Hartz had a neighbor contact Robert Kutcher of the Law Firm of Chopin, Wagar, Richard & Kutcher, to see if the firm could give her limited assistance concerning her current tenure negotiations with Tulane. At that time, Mr. Farrugia was apparently on vacation. As the bills from the Chopin

Wagar Firm to Dr. Hartz indicate[5], the first contact between anyone at the Chopin Firm and Dr. Hartz was on June 22, 2003. On June 23, 2003, Nicole Tygier of the Chopin Firm met with Dr. Hartz, and began to assist her in preparing a response letter to Mary Smith at Tulane. The June 24, 2003 and June 25, 2003 time entries in the bills refer to the letter to Mary Smith, who was the EEOC/Affirmative Action Compliance Officer for Tulane University. Ms. Tygier made several revisions and additions to a draft of a letter prepared by Dr. Hartz to Mary Smith, and on June 30, 2003, Dr. Hartz sent the correspondence to Mary Smith under her own signature. Trial Record at Volume 1, Pages 482-489. After the June 30, 2003 letter to Mary Smith was sent by Dr. Hartz, she had no further contact with the Chopin Firm until July 16, 2003. On July 16, 2003, Nicole Tygier of the Chopin Firm spoke with Dr. Hartz, and was told not to take any further action because Hartz' attorney, Victor Farrugia, was going to continue the negotiations with Tulane. Trial Record at Volume 1, Page 471. After July 16, 2003, Dr. Hartz never again communicated with anyone at the Chopin Firm, other than to pay the contemporaneous invoices submitted by the Chopin Firm to her.

After the July 16, 2003 telephone conversation between Dr. Hartz and Nicole Tygier, in which Dr. Hartz told the Chopin Firm that Mr. Farrugia would be handling all matters going forward, Mr. Farrugia continued to represent Dr. Hartz. In fact, on August 22, 2003, Mr. Farrugia went with Dr. Hartz to the office of the U.S. Equal Employment Opportunity

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[5] Trial Record at Volume 1, Pages 470-472.

Commission, on Loyola Avenue in New Orleans, Louisiana. Mr. Farrugia physically went with Dr. Hartz to help her file an EEOC charge against Tulane, in which Dr. Hartz contended that Tulane had discriminated against her on the basis of gender by denying her tenure. Trial Record at Volume 1, Page 387. Again, it is undisputed that Dr. Hartz never contacted the Chopin Firm regarding the filing of this EEOC charge, and in fact, never even notified them that she was filing such a charge. For all the Chopin defendants knew, after July 16, 2003, Dr. Hartz and Mr. Farrugia had successfully negotiated a resolution with Tulane.

After the filing of the EEOC charge, Victor Farrugia continued to represent Dr. Hartz for several years, engaging in a variety of letters, e-mails, and other communications with Dr. Hartz, and the personnel at the EEOC. While Mr. Farrugia was representing Dr. Hartz, on August 29, 2003, Mary Smith of Tulane responded to Dr. Hartz' grievance, stating that she found "no facts to suggest that you were either discriminated against because of your gender, or that any decisions made regarding you were unlawfully motivated by retaliation." Trial Record at Volume 1, Pages 390-391. Again, it is undisputed that Dr. Hartz never notified the Chopin Wagar defendants of this response from Mary Smith.

Dr. Hartz' EEOC claim slowly proceeded forward until March 15, 2006, when she received a dismissal and Notice of Rights Letter from the EEOC, indicating that they would not be pursuing the matter any further. Trial Record at Volume 1, Page 392. After receiving the Right to Sue Letter from the EEOC, Mr. Farrugia wrote several letters to the EEOC, requesting

copies of the relevant file materials. Trial Record at Volume 1, Pages 512-513. He provided those file materials to Dr. Hartz, but on June 1, 2006, he received an e-mail from Dr. Hartz indicating that she was terminating his services. In that e-mail, Dr. Hartz indicated that she was engaging new counsel to represent her interests in a suit to be filed against Tulane. Dr. Hartz' new counsel (Phipps & Phipps) obtained the file materials from Mr. Farrugia, and filed a Complaint against the Administrators of the Tulane Education Fund, University Healthcare System, LLC on June 8, 2006.

REASONS FOR DENYING THE PETITION

In Petitioner's Writ, she contends that there exists "factual disputes" which should have prevented Petitioner's case from being dismissed.

The factual determinations and analysis of Louisiana substantive law made by the District Court and the Fifth Circuit do not represent a departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power. Accordingly, Petitioner has not carried her burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

ARGUMENT

I. THE TRIAL COURT WAS CORRECT IN GRANTING SUMMARY JUDGMENT

A. No Potential Cause Of Action Was Lost By Dr. Hartz During The Representation By The Chopin Defendants

When the Chopin defendants filed their Summary Judgment on the plaintiff's inability to prove the elements of a legal malpractice claim, they addressed two (2) separate shortcomings of plaintiff's claim. The first issue concerned the scope of the representation provided by the Chopin defendants, and the existence of no legal duty on their part to render any advice on any legal malpractice claim.[6] The second issue raised and briefed by the Chopin defendants concerned the legal argument that the plaintiff could not prove any action by the Chopin defendants caused her damage, since any legal malpractice claim against Victor Farrugia remained viable for some two years and nine months after the Chopin defendants representation terminated. Trial Record at Volume I, Pages 455-460.

In granting the Summary Judgment Motion filed by the Chopin defendants, the District Court found in favor of the Chopin defendants on both independent grounds for summary judgment. To be precise, the District Court ruled

> Finally, Hartz's claim against the Chopin Defendants suffers from the additional infirmity

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[6] That issue is discussed *infra*

> in that the legal malpractice claim against Farrugia did not prescribe until April 2006,[7] which is nearly 2 years and 9 months after the Chopin Defendants terminated their relationship with Hartz on July 16, 2003. In *Oyefodun v. Spears*, the Fourth Circuit upheld a trial court ruling that recognized that an attorney could not be liable for legal malpractice when he withdrew from the case almost a year before the case prescribed. 669 So.2d 1261 (La. App. 4th Cir. 1996). Similarly, the Chopin Defendants are not responsible for the loss of a claim that prescribed nearly three years after their representation ended.

See Ruling, Page 16.

Dr. Hartz never addressed or briefed any alleged error by the District Court in finding that the Chopin defendants could not be held "responsible for the loss of a claim that prescribed nearly three years after their representation ended." Ruling at Page 16. Our courts have long held that an Appellant abandons all issues not raised and argued in its initial Brief on appeal. *Cinel v. Connick*, 15 F.2d 1338, 1345 (5th Cir. 1994); *Lewis v. Pugh*, 289 Fed. Appx. 767, 771 (5th Cir. 2008); and *In Re Tx. Mortg. Services Corp.*, 761 F.2d 1068, 1075 (5th Cir. 1985). As the Fifth Circuit recently stated:

> When an appellant fails to identify error in the district court's decision, it is as if the appellant

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[7] Three years after the EEOC charge should have been filed in April 2003.

> had not appealed that judgment, and this court "will not raise and discuss legal issues that [Payne] has failed to assert." *Brinkmann v. Dallas County Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987). Similarly, the failure to provide any legal or factual analysis of an issue on appeal waives that issue. *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.2d 256, 260 n. 9 (5th Cir. 1995).

Payne v. Khoshdel, 255 Fed. Appx. 921, 922 (5th Cir. 2007).

Since the Petitioner never addressed or briefed before the Fifth Circuit any alleged error in the District Court's finding that no potential claim was lost by Dr. Hartz during the representation by the Chopin defendants, any objections to that part of the Court's Ruling were waived and abandoned. That portion of the Court's Ruling was therefore uncontested, and the Fifth Circuit could therefore affirm the District Court's holding on that basis alone.

Although Petitioner has waived any objection to this part of the Court's Ruling, it is also clear that the District Court was correct in finding that the Chopin defendants could not be held responsible in legal malpractice for an underlying claim that did not prescribe during their representation. That conclusion is well supported by Louisiana law, as well as the law of our sister states.

In ruling in the *Hartz v. Tulane* case, the U.S. Fifth Circuit found that any EEOC charge needed to be filed by April 2003 in order for it to have been timely. That necessarily means that the malpractice of Victor

Farrugia took place in April of 2003. Pursuant to Louisiana Revised Statute 9:5605, Dr. Hartz would have had until April 2006 within which to file a legal malpractice claim against Victor Farrugia.

The undisputed facts of this case demonstrate that the Chopin defendants only provided limited representation to Dr. Hartz from June 22, 2003 through July 16, 2003. After July 16, 2003, the Chopin defendants ceased any representation of Dr. Hartz, and never heard a single communication again from her, other than for payment of their bills.

At the time that the Chopin defendants ceased representing Dr. Hartz on July 16, 2003, Dr. Hartz had approximately two years and nine months left to file any legal malpractice claim she might have against Victor Farrugia, barring her earlier discovery of that alleged act. Not only did she not lose any potential claim against Victor Farrugia while she was being represented by the Chopin defendants, Dr. Hartz had two years and nine months **after** the time that she terminated the Chopin defendants' representation to file any legal malpractice claim against Mr. Farrugia. As such, in addition to the fact that there was no attorney-client relationship between Dr. Hartz and the Chopin defendants concerning any potential legal malpractice claim against Victor Farrugia, it is also clear that the Chopin defendants' actions could not have caused her any damage, since no right was lost during their representation.

Support for this common sense proposition can be found in numerous Louisiana cases, as well as cases from other jurisdictions. In *Oyefodun v. Spears*, *supra*, the Court analyzed exactly when a plaintiff's

underlying cause of action against a different defendant would have prescribed. After finding that the plaintiff's claim against the original defendant did not prescribe while she was being represented by the attorney, the Court found that the attorney had not committed legal malpractice, and dismissed all claims against the attorney. *Id.* at 1264.

Similarly, in *Darbonne v. Guillory*, 649 So. 2d 681 (La. App. 3 Cir. 11/2/94). The Court analyzed whether or not the plaintiff stated a sufficient cause of action in legal malpractice against her former attorney. The Court first looked to determine exactly when the underlying worker's compensation claim would have become time-barred. After analyzing the applicable time period, the Court determined that the worker's compensation claim did not prescribe while the attorney was representing the client, and therefore the attorney could not have committed legal malpractice. *Id.* at 683. *Accord: Steketee v. Lintz, Williams & Rothberg*, 694 P. 2d 1153, (Ca. 1985); *Harvey v. Mackay*, 440 N.E. 2d 1022 (Il. 9/27/1982) (dismissing a legal malpractice claim where the Court found that it was "apparent that plaintiff had over one year to pursue any potential actions against Harris Bank after defendant withdrew as her attorney"); and *Shelly v. Hansen*, 53 Cal. Rptr. 20 (Ca. 2d Dis. 8/15/1966) (no malpractice claim where the underlying cause of action did not become time-barred while plaintiff was represented by the defendant attorney).

The Chopin defendants simply did not cause Dr. Hartz to lose any potential cause of action, and cannot be held responsible for legal malpractice. As is admitted by the plaintiff, Dr. Hartz never communicated at all with the Chopin defendants after

advising them on July 16, 2003 that Victor Farrugia would be handling Tulane negotiations going forward. At that point, Dr. Hartz had never even discussed the possibility of filing an EEOC charge against Tulane with the Chopin defendants, but rather had expressed her desire to continue negotiations with Tulane. The affidavits of Robert Kutcher and Nicole Tygier confirm this, as do the bills that were received and paid by Dr. Hartz.

Over a month after her last contact with the Chopin defendants, Dr. Hartz decided to file an EEOC charge against Tulane, specifically seeking the assistance of Victor Farrugia. Had Dr. Hartz picked up the phone and contacted the Chopin defendants seeking their assistance on the filing of such a charge, perhaps the Chopin defendants would have had an opportunity to render advice to her regarding the possible defenses or problems with such a claim. Moreover, at any point while that EEOC charge was pending, for approximately two years and seven months, Dr. Hartz could have called, e-mailed, or otherwise communicated with the Chopin defendants, seeking their advice on her current issues with Tulane. She never made such contact, and therefore the Chopin defendants never had the opportunity to address any of the issues of which Dr. Hartz now complains. It would be simply unconscionable to allow a plaintiff to blame an attorney for the loss of a claim, when that claim was lost some two years and nine months after the time that the attorney stopped representing the client on any matters. That is exactly what Dr. Hartz was asking the Court to find. The District Court correctly rejected those pleas.

Because any claim for legal malpractice against Victor Farrugia remained viable for approximately two years and nine months after the time that the limited representation by the Chopin defendants was terminated, the Chopin defendants simply were not the cause of any damage to Dr. Hartz, and the District Court correctly dismissed her legal malpractice claims.

B. The District Court Correctly Held That The Chopin Defendants Owed No Duty To Render Any Legal Advice To Dr. Hartz Concerning Legal Malpractice By Victor Farrugia

In the District Court's well reasoned Opinion, the Court correctly analyzed the law applicable to Louisiana legal malpractice claims. Pursuant to well established Louisiana law, in order to prove a claim for legal malpractice under Louisiana law, the plaintiff must establish the following three elements: (1) an attorney-client relationship, (2) the attorney was negligent in his representation of the client; and (3) that negligence caused plaintiff loss. The plaintiff bears the burden of proof of each of these elements. *Costello v. Hardy*, 03-1146 (La. 1/21/04), 864 So.2d 129; *Ramp v. St. Paul Fire & Marine Ins. Co.*, 263 La. 774, 269 So.2d 239 (1972); *Francois v. Reed*, 97-1328, p. 4 (La. App. 1st Cir. 5/15/98), 714 So.2d 228, 229-230.

With regard to element number (1) of plaintiff's burden of proof, it has long been the law of Louisiana that:

> "The attorney-client relationship is contractual in nature and is based upon the express agreement of the parties as to the nature of

> work to be undertaken by the attorney. The agreement or consent of an attorney to perform work for a party on a particular matter or transaction does not create an attorney-client relationship as regards other business or affairs of the client. *Delta Equipment & Construction Co. v. Royal Indemnity Co.*, 186 So.2d 454 (La. App. 1st Cir. 1966)."

See Grand Isle Campsites, Inc. v. Chuck, 262 So.2d 350 (La. 1972). See also: *St. Paul Fire & Marine Ins. Co. v. GAB Robbins North America*, 2008 WL 4952777 (La App. 4th Cir. 11/19/08); *Bergman v. New England Ins. Co.*, 872 F.2d 672 (5th Cir. 1989); *Lifemark Hosp., Inc. v. Jones, Walker, Waechter, Poitevent, Carrere & Denegre*, No. 94-1258, 1997 WL 33473806 at #5 (E.D. La. 11/13/1997) (Fallon, J.). Moreover, as one Court has stated:

> A lawyer owes his client great responsibilities and duties and any obligations of such gravity and magnitude may not be involuntarily thrust upon an attorney.

Olympia Roofing Co., Inc. v. City of New Orleans, 288 So.2d 670, 671 (La. App. 4th Cir. 1974) citing *Delta Equipment & Construction Co. v. Royal Indemnity Co.*, *supra*. With regard to the proper analysis of legal malpractice cases in Louisiana, the District Court Ruling specifically stated that:

> A failure to act will give rise to civil liability only if it occurs within the context of a duty to act. *Lifemark Hosp., Inc. v. Jones, Walker, Waechter, Poitevent, Carrere & Denegre*, No. 94-1258, 1997 WL 33473806 at #5 (E.D. La. Nov.

> 13, 1997) (Fallon, J.). In the case of legal malpractice duty is defined by the attorney-client relationship. *Id.* (Citing *Grand Isle Campsites, Inc. v. Check*, 262 So.2d 350 (La. 1972); *Delta Equip. & Constr. Co. v. Royal Indem. Co.*, 186 So.2d 454 (La. App. 1st Cir. 1966)). The attorney-client relationship is "purely contractual" and results only from "the mutual agreement and understanding of the parties concerned." *Id.* (quoting *Delta Equip.*, 186 So.2d at 458). "Such a relationship is based only upon the clear and express agreement of the parties as to the nature of the work to be undertaken by the attorney and the compensation which the client agrees to pay therefore." *Id.* "Authorization to represent a client in connection with a specific legal matter does not imply authorization to handle all others, nor does the agreement or consent of an attorney to represent a [] client in a particular matter create an attorney-client relationship as regards other business or affairs of the client." *Id.*

Trial Record at Volume 3, Pages 1664-1665.

Considering this settled law of Louisiana, the District Court reached the proper conclusion in dismissing plaintiff's legal malpractice claim particularly given the limited involvement of the Chopin defendants with Dr. Hartz and the short period of time they assisted her with her Tulane tenure negotiations.

As the Affidavits from defendants Nicole Tygier and Robert Kutcher demonstrate,[7] when they were contacted by Dr. Hartz on June 22, 2003, they were only requested to assist her with her "Tulane Tenure Negotiations," and in particular with the drafting of a letter to Mary Smith. Dr. Hartz never mentioned the filing of an EEOC charge against Tulane, and of course never even mentioned the possibility of suing Victor Farrugia. These facts are confirmed by the invoices submitted by the Chopin Firms to Dr. Hartz, which were prepared contemporaneously with the services provided by the Chopin defendants. The bills were prepared on July 16, 2003, and August 29, 2003, and clearly note at the top that the work is performed for "Tulane Tenure Negotiations." Trial Record at Volume 1, Pages 470-472. Dr. Hartz admitted that she received and reviewed these bills, and in fact paid them shortly after their receipt.[8]

The Affidavits of defendants Tygier and Kutcher are not only supported by the bills submitted to Dr. Hartz and paid by Dr. Hartz, they are also supported by the events that occurred after their limited assistance to Dr. Hartz. For example, Dr. Hartz continued to engage Victor Farrugia after the Chopin defendants helped her prepare the June 30, 2003 letter to Mary Smith, and after the July 16, 2003 telephone call from Dr. Hartz advising the Chopin defendants that they should take no further action because Mr. Farrugia would be handling the matters going forward. Plaintiff has admitted that Victor Farrugia

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[7] Trial Record at Volume 1, Pages 534-535.

[8] Trial Record at Volume 1, Page 503.

went with her to file the EEOC charge on August 22, 2003, and that in fact he helped her prepare said charge.[10] There are numerous e-mails and pieces of correspondence between Dr. Hartz and Victor Farrugia between July 2003 and June 2006, and numerous communications between Victor Farrugia and the EEOC during that time frame.

What does not exist, however, is one single communication between Dr. Hartz and the Chopin defendants, or between the EEOC or Tulane and the Chopin defendants, between July 16, 2003 and the June 16, 2006 filing of this legal malpractice lawsuit. The records clearly show that Dr. Hartz hired Victor Farrugia on March 26, 2003, paid him a $10,000.00 retainer to represent her interests in her disputes with Tulane, and continued to engage Mr. Farrugia up and until June 3, 2006.

Pursuant to *Grand Isle Campsites, Inc. v. Check* and its progeny, a plaintiff cannot thrust upon an attorney an obligation to opine on matters which were never requested or even raised by the client. The District Court correctly found that the Chopin defendants had no duty to render an opinion or advice concerning the hypothetical malpractice of Victor Farrugia, particularly since the plaintiff has admitted that she never even *raised* that possibility during her conversations with the Chopin defendants.

The similar case of *Buras v. Mara*, 892 So.2d 83 (La. App. 5 Cir. 12/14/04), was cited by the Trial Judge. In *Buras*, a plaintiff sued their ex-attorney for

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[10] Trial Record at Volume 1, Page 501.

legal malpractice, contending that the attorney had committed legal malpractice by failing to timely file a particular legal malpractice action against the client's former attorney. The plaintiff in *Buras* engaged defendant Marx to file a legal malpractice lawsuit against attorney Stephen Caire, concerning Mr. Caire's alleged failure to advise the plaintiff of a settlement offer in prior litigation. The plaintiff contended that Mr. Marx committed legal malpractice by failing to file a separate legal malpractice claim against Caire, which allegedly would have involved an error by Caire in the rendition of an arbitration judgment against the plaintiff. Marx responded by arguing that he had never agreed to file a legal malpractice claim against Caire for the arbitration award, even though that possibility had been raised by the plaintiff. The Court agreed with Marx, finding that he had declined to represent the plaintiff on any legal malpractice claim concerning the arbitration award. *Id.* at 87.

The *Buras* Court then went on to address the plaintiff's claim that when Marx refused to represent her on the arbitration malpractice claim, he had an obligation to tell her of any applicable prescriptive periods that might affect that malpractice claim. Plaintiff relied in part upon the Rules of Professional Conduct, arguing that it was the attorney's obligation to advise him of any pertinent prescription dates when declining to represent him on the arbitration legal malpractice claim. In rejecting that argument, the Louisiana Appellate Fifth Circuit stated that

> "the Rules of Professional Conduct relied on by plaintiff regarding communications with clients and declining representation do not require an

> attorney to give notice of prescription dates when representation is refused." *Id.*

The Court then stated that "the record in this case indicates that Marx did not agree to represent Buras in this claim, and was under no duty to render information or advice to him on this issue. Further, the fact that Marx represented Buras as to other matters did not create a duty on the lawyer's part to advise him on aspects of a claim he declined to handle." *Id.* at 87. The Court therefore dismissed the legal malpractice claims against Mr. Marx and his firm.

While the Court's rationale in *Buras* certainly supports the Chopin defendants' Motion for Summary Judgment, the facts of our case are actually even more compelling. In *Buras*, the defendant attorney had actually agreed to file a legal malpractice suit against an attorney, and the dispute was over whether or not he had agreed to bring a separate but related legal malpractice claim against the same attorney. The *Buras* Court found that the attorney had not agreed to represent the plaintiff on a particular legal malpractice claim, and therefore he had no obligations to file anything on plaintiff's behalf, or to provide him with any advice concerning the applicable prescriptive/peremptive periods. In this case, it is undisputed that the plaintiff never even raised the possibility of suing Victor Farrugia to the Chopin defendants, and therefore (unlike in *Buras*) there was never even a request by the client to render any advice on the specific subject matter at issue. Dr. Hartz attempts to create a duty on the part of an attorney to render advice concerning a claim that she never even requested the Chopin defendants look at, and it is

clear from *Grand Isle* and *Buras* that no such duty exists as a matter of law. *Accord: Dahlin v. Jenner & Block*, 2001 WL 855419 (N.D. Il. 07/26/01); *Joe v. 239 Joint Venture*, 145 SW 3d 150, 159-160 (Tx. 2004).

In this case, Petitioner's complaint does not even allege that she engaged the Chopin defendants to opine on any malpractice by Farrugia. To the contrary, her complaint specifically states that she was *unaware* of any possible malpractice or negligence by Farrugia until June, 2006. See Complaint, Paragraphs 29, 30, 33 and 36. Since there is no proof or evidence that Dr. Hartz ever retained the Chopin defendants to opine on any hypothetical malpractice by Farrugia, under the *Dahlin* analysis (consistent with Louisiana law), Dr. Hartz' malpractice claims were correctly dismissed.

In reaching its decision, the District Court took into account all factors, including Dr. Hartz' deposition, her Complaint, and the unambiguous, contemporaneous documents. The Court rejected Dr. Hartz' attempts to create a legal obligation on the part of an attorney to opine on hypothetical scenarios that had never been requested, or even contemplated, by any of the parties. The District Court correctly rejected the creation of such an expanded duty on the part of the Chopin defendants, and other Louisiana attorneys.

C. No Legal Duty Existed On The Part Of The Chopin Defendants To Render Any Advice On Potential Legal Malpractice Claims Against Victor Farrugia

In the District Court's Ruling, the Court found that the undisputed material facts and the applicable law

compelled the conclusion that the Chopin defendants had no legal duty to provide any advice to Dr. Hartz regarding hypothetical, potential legal malpractice claims against Victor Farrugia. In fact, the District Court noted that since Dr. Hartz had admitted that she never suspected any negligence on the part of Victor Farrugia (and thus never even raised the issue with the Chopin defendants), a finding of a duty to advise Dr. Hartz to sue Victor Farrugia would necessarily mean that the Chopin defendants had a duty to *unilaterally* investigate any and all legal malpractice claims Dr. Hartz might have had against any attorneys. District Court Opinion, Page 15. The Court correctly refused to find such an expansive duty under Louisiana law, particularly given the complicated nature of such advice, and the limited nature of the Chopin defendants' representation. *Id*, at Page 15.

In her Brief, Petitioner relies upon an "expert" report issued by Beth Alston. The District Judge correctly ruled that expert testimony was not needed to determine whether a legal duty existed in this matter, and therefore the Court never needed to address the questionable[11] report issued by Ms. Alston. See *Askanase v. Fatjo*, 130 F.2d 657, 672-673 (5th Cir. 1997) (not allowing expert testimony from an attorney concerning issues of law). As such, Dr. Hartz' current

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[11] Some of the problems and errors contained in Ms. Alston's report were discussed in the Chopin defendants' Opposition to Hartz' Motion for Summary Judgment. Trial Record at Volume 2, Page 810-811.

reliance upon the so called expert report of Ms. Alston is misplaced.[12]

D. The Plaintiff Did Not Come Forth With Sufficient Summary Judgment Evidence To Support Her Legal Malpractice Claim Against the Chopin Defendants

In the District Court's Ruling, the Court set forth the three elements of a legal malpractice claim under Louisiana law. It is the plaintiff's burden to prove all three elements. The failure to prove any one element is fatal to the plaintiff's claim. The undisputed facts in this case demonstrate that Dr. Hartz has not proven her claim against the Chopin defendants.

In Dr. Hartz' trial pleadings and briefs, she attempts to argue that the Chopin defendants have somehow admitted that they were engaged by Dr. Hartz to render far-reaching advice concerning both hypothetical legal malpractice claims against Victor Farrugia, and the filing of a formal EEOC charge against Tulane. The undisputed facts show such an allegation is patently false.

First, Dr. Hartz quotes a paragraph from the Chopin Defendants' Answer, implying that said Answer is somehow inconsistent with the testimony and contemporaneous documents confirming the Chopin Defendants' limited representation of Dr. Hartz. That representation was limited to assisting

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[12] Defendants submitted their own legal malpractice expert report, which of course completely disagreed with the findings of Ms. Alston. Trial Record at Volume 1, Page 546.

Dr. Hartz in the Tulane Tenure Negotiations, and in particular the preparation of a response letter to Mary Smith, the EEOC/Affirmative Action Compliance Officer at Tulane. Plaintiff's argument in this regard is misleading. In their Answer, the Chopin Defendants state:

> 26.
>
> It is admitted that while plaintiff was continuing to be represented by defendant Victor Farrugia, **plaintiff sought additional legal counsel from the law firm defendants concerning her dispute with Tulane.** However, plaintiff requested that defendant take no other action while defendant Victor Farrugia was negotiating with Tulane.

(Emphasis Added). Trial Record at Volume 1, Pages 71-81. Black's Law Dictionary defines "Negotiation" as, "a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter." (Emphasis Added). Black's Law Dictionary (8th ed. 2004).

As a result, any argument by the plaintiff that both the Chopin defendants' Motion for Summary Judgment and the bills submitted to (and paid by) Dr. Hartz somehow contradict the Answer filed by the Chopin defendants, is wholly without merit. In fact, Defendants' arguments are entirely consistent with both the Answer and the contemporaneous bills submitted to Dr. Hartz. The fact that negotiations were ongoing would necessitate a finding that a dispute existed. In other words, if there was no dispute between Dr. Hartz and Tulane, there would be

no negotiations. It is impossible for an interpretation of the phrases to conclude otherwise.

Moreover, Dr. Hartz attempts to manufacture a fact issue by implying that certain time entries on the Chopin bills "might have been" for some broader, formal EEOC charge advice. However, it is undisputed that Dr. Hartz did not even file her EEOC charge until August 22, 2003, over a month after the Chopin Defendants stopped representing her. Trial Record at Volume 1, Page 387. Dr. Hartz has admitted that she never even told the Chopin Defendants of the EEOC charge that she and Victor Farrugia filed,[13] and therefore it is disingenuous at best for plaintiff to try to imply that the Chopin Defendants were working on the EEOC charge, or communicating with the government concerning said charge. See also Trial Record at Volume 2, Pages 677.

Concerning the letter to Mary Smith, the record is clear that Ms. Tygier performed revisions on a draft already prepared by Dr. Hartz (on someone on her behalf). Trial Record at Volume 1, Page 473. The letter to Mary Smith was not an "opinion letter" to Dr. Hartz, in which the Chopin defendants provided her with legal opinions on a wide range of topics. That letter was part of an ongoing internal process at Tulane, in which Dr. Hartz was attempting to pursue her complaints through Tulane personnel. Ms. Tygier proposed some changes to Dr. Hartz' letter to Mary Smith, and then Dr. Hartz signed the letter and sent it out. That letter recites statements allegedly made by Mary Smith and others, which alleged statements

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[13] Trial Record at Volume 1, Pages 505-506.

were put in the letter by Dr. Hartz. Any alleged statement by Ms. Smith that Dr. Hartz should not file an EEOC complaint "until after tenure was denied" is certainly not legal advice on the part of the *Chopin defendants*, despite Appellant's attempts to distort the Smith letter.

Regarding Dr. Hartz' tortured interpretation of the contemporaneous bills submitted by the Chopin defendants, it is clear that these bills accurately reflect the limited work performed by the Appellees. Those bills were prepared and sent to Dr. Hartz by July 2003. Dr. Hartz received then, and paid them. If she had a disagreement with any of the entries, or the work performed by the firm, she certainly would have questioned the bills. She did not. Trial Record at Volume 2, Page 670. Instead, she continued with the representation of her by Victor Farrugia.

The bills submitted by the Chopin defendants clearly include that on July 16, 2003 they had been told by Dr. Hartz that Victor Farrugia would be handling the matter going forward. Trial Record at Volume 1, Page 471. In her Brief, Dr. Hartz engages in a nonsensical analysis of that entry, in an attempt to support her after-the-fact deposition testimony that the Chopin defendants "told her to go back to Victor Farrugia". The bills clearly state otherwise, and they also clearly state that the limited other time entries were for communications with Tulane concerning the Smith letter.[14] Again, if Dr. Hartz disagreed that the

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[14] Similarly, despite Appellant's fanciful ramblings, the references to "EEOC" in the bills did and could only refer to Mary Smith, as

Chopin defendants were providing legal services for "Tulane Tenure Negotiation", or that it was Dr. Hartz who advised the Chopin defendants that Farrugia would be handling the negotiations going forward (all as was clear from the clear language of the bills received and paid by Dr. Hartz), she would have questioned those bills. She did not. Nonetheless, Dr. Hartz has admitted that she never even raised the possibility of any errors by Farrugia with the Chopin defendants, and has admitted that she never even told the Chopin defendants of the EEOC complaint she and Mr. Farrugia filed on August 22, 2003. Trial Record at Volume 2, Pages 673, 674. Therefore, even her distorted reading of the Chopin defendants' bills and related documents cannot change the fact that there never existed a contractual agreement between Dr. Hartz and the Chopin defendants to render any legal advice on the existence of any potential legal malpractice claims against Victor Farrugia.

The uncontroverted facts show that the Chopin Defendants were not requested to advise and did not agree to advise Dr. Hartz regarding either the filing of a formal EEOC charge, or any hypothetical legal malpractice claim against Victor Farrugia. Therefore, there can be no *presumption* of negligence. As a matter of established Louisiana law, the plaintiff bears the burden of proving a duty, the breach of that duty,

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there was no EEOC charge pending at that time. Trial Record at Volume 2, Page 677.

and causation of damages.[15] That is a burden the plaintiff has not, and indeed cannot, meet.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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July 14, 2010

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[15] As discussed *supra*, Petitioner's Briefs never even addresses the undisputed fact that any legal malpractice claim against Victor Farrugia remained viable for almost two years and nine months after the termination of the Chopin defendants' representation.

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No. 09-1390

In The
Supreme Court of the United States

RENEE S. HARTZ, M.D.,

Petitioner,

v.

VICTOR R. FARRUGIA; ROBERT A. KUTCHER; NICOLE TYGIER; CHOPIN, WAGAR, RICHARD, AND KUTCHER, LLP,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, when the United States Fifth Circuit Court of Appeals affirmed the decision dismissing Petitioner's legal malpractice claim, the Fifth Circuit Court of Appeals sanctioned such a departure from the accepted course of judicial proceedings as to call for an exercise of this Court's supervisory power.

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ARGUMENT

I. The District Court Ignored Factual Disputes Concerning Scope Of Representation, Duties Owed, And Whether Mr. Kutcher And Ms. Tygier Caused A Loss

Mr. Kutcher and Ms. Tygier admitted to the Fifth Circuit the only issues the district court decided regarding the legal malpractice claim were: "the scope of representation and duties owed."[1] Here, they contend the district court also found they could not be held responsible for the loss of a legal malpractice claim that remained viable two years and nine months after their representation ended.

They also contend Dr. Hartz failed to offer any argument to the Fifth Circuit concerning that third element of her legal malpractice claim, i.e., their negligence caused her the loss of her legal malpractice claim against Mr. Farrugia. In at least 13 passages in her Appellant Original Brief at pages iv-v, 2-4, 5, 6, 19-21, 22-23, 24-25, 26-27, 29-30, 40-41, 43-47, 53, and 55, Dr. Hartz discussed the loss she suffered which was caused by Mr. Kutcher and Ms. Tygier's negligence.[2] Their contention Dr. Hartz "waived" argument about her loss is unavailing. The "waiver cases" they cite are not relevant.

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[1] Appellee Brief, p.46.

[2] Also in district court, R.864-1192; R.1695.

In dicta, the district court discussed the third element of Dr. Hartz's legal malpractice claim in terms of the amount of time such claim remained viable, citing *Oyefodun v. Spears*, 669 So.2d 1261 (La. App. 4th Cir. 1996).[3] The holding in *Oyefodun* addressed application of La. Civil Code article 3463 to the interruption or suspension of prescription, where Ms. Oyefodun was aware of the existence of her malpractice claim. (La. Rev. Stat. Ann. § 9:5605(A)(2007) provides a legal malpractice claim is not preempted until three years elapse.)

Dr. Hartz's lack of knowledge of the existence of a malpractice claim against Mr. Farrugia distinguishes her from the plaintiff in *Oyefodun*, and makes her situation analogous to the plaintiff's situation in *Federal Sav. v. McGinnis, Juban, Bevan et al.*, 808 F.Supp. 1263, 1269 (E.D. La. 1992). (A full discussion about whether Mr. Kutcher and Ms. Tygier caused the loss of the legal malpractice claim against Mr. Farrugia is at Dr. Hartz's Petition For Writ Of Certiorari, pages 23-29.) In the four additional legal malpractice cases cited by Mr. Kutcher and Ms. Tygier, each malpractice plaintiff was fully aware of the existence of the underlying claim.[4]

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[3] Appendix 17.

[4] *Darbonne v. Guillory*, 649 So.2d 681 (La. App. 3rd Cir. 1994) (plaintiff aware of worker's compensation claim);

Steketee v. Lintz, et al., 694 P.2d 1153 (Ca. 1985) (plaintiff aware of medical malpractice claim);

(Continued on following page)

Mr. Kutcher and Ms. Tygier contend the district court determined they had no duty to advise Dr. Hartz about the existence of a claim against Mr. Farrugia. Actually, the district court stated an inquiry by Dr. Hartz about the EEOC charge "would have triggered a duty to inform Hartz about a potential malpractice claim against Farrugia."[5] Dr. Hartz made such inquiry to Mr. Kutcher and Ms. Tygier. However, the district court "ignored" this fact. (A full discussion of additional material facts which the district court ignored is at Dr. Hartz's Petition For Writ Of Certiorari, pages 17-23.)

Whether an attorney breached a duty imposed upon him and breached the standard of care in the Louisiana legal community, is a question of fact, not a question of law. *Federal Sav.*, *supra* at 1269, 1270; *Ramp v. St. Paul Fire and Marine Ins. Co.*, 269 So.2d 239, 244 (La. 1972). *Dixon v. Perlman*, 528 So.2d 637, 643 (La. App. 2nd Cir. 1988) (testimony regarding practice of prudent local attorneys important to resolution of case). Dr. Hartz offered expert testimony Mr. Kutcher and Ms. Tygier breached the standard of

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Harvey v. Mackay, 440 N.E.2d 1022 (Ill. 1982) (plaintiff aware of legal malpractice claim);

Shelly v. Hansen, 53 Cal. Rptr. 20 (Ca. 2nd Dis. 1966) (plaintiff aware of breach of contract/mechanic's lien claim).

[5] R.1672, Appendix 16, n.6.

care in the statewide legal community.[6] The district court ignored Dr. Hartz's expert's testimony regarding that question of fact.

Mr. Kutcher and Ms. Tygier fault Dr. Hartz for not providing them "an opportunity to render advice to her regarding the possible defenses or problems with [her claims against Tulane]." That is exactly what Dr. Hartz did when she engaged them to assist her with her "dispute with Tulane." They had ample opportunity to address the issues of which Dr. Hartz complains. They utterly failed to do so. Consequently, Dr. Hartz remained unaware of the existence of a legal malpractice claim against Mr. Farrugia until she contacted undersigned counsel by which time that claim was preempted.

Mr. Kutcher and Ms. Tygier cite *Grand Isle Campsites v. Cheek*, 62 So.2d 350 (La. 1972) arguing their representation was limited. *Cheek* involved a scope of representation "limited by the express agreement between [the lawyer] and the corporation's officers," *Federal Sav.*, *supra* at 1269. Here, the record evidence is to the contrary. There was no written contract, no engagement letter, and Dr. Hartz's deposition testimony was she sought their advice on what her options were and "has Farrugia led me wrong?"[7] Not only did the district court ignore

[6] Purported "questions" about Ms. Alston's opinion were unfounded. R.1327, 1356-1363.

[7] R.982.

the facts, it faulted Dr. Hartz for failing to nail down the scope of representation.

Mr. Kutcher and Ms. Tygier cite *Buras v. Marx*, 892 So.2d 83 (La. App. 5th Cir. 2004), *cert. denied*, 896 So.2d 70 (La. App. 5th Cir. 2005). The *Buras* plaintiff *was aware* of the existence of a legal malpractice claim concerning an arbitration award for which defendant-attorneys had declined to represent Mr. Buras. Here, Dr. Hartz *was unaware* of the malpractice claim.

Duties associated with legal representation present issues of fact. *Cheek* and *Buras* do not provide "as a matter of law" what are an attorney's duties. The *Cheek* and *Buras* outcomes were dependent on the facts of each case. *Cheek* and *Buras* offer Mr. Kutcher and Ms. Tygier no support, and neither does *Oyefodun*.[8]

Mr. Kutcher and Ms. Tygier refer to Ms. Tygier's review and revision of the letter to Mary Smith as "tenure negotiations."

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[8] Nor is support found in:

Joe v. 239 Joint Venture, 145 S.W.3d 150 (Tx. 2004) no legal malpractice found where plaintiff claimed attorney breached fiduciary duty to plaintiff due to an alleged conflict of interest;

Dahlin v. Jenner & Block, 2001 WL 855419 (N.D. Ill. 2001), on 12(b)(6) motion legal malpractice claims dismissed as time-barred. *Id.* at *6.

Aside from the fact there were no "tenure negotiations,"[9] they imply one person, Mary Smith, EEO/VP, was empowered to "grant" tenure. They offer no evidence in support of that ludicrous assertion.

The letter to Ms. Smith addresses her as "Equal Employment Officer, Mary Smith" at Tulane.[10] The e-mails from Ms. Tygier which refer to Ms. Smith identify her as "EEO."[11] Neither the letter nor e-mails referring to Ms. Smith misstate Ms. Smith's title as "*EEOC* Affirmative Action Compliance Officer." Ms. Tygier always referred to Ms. Smith as the "Equal Employment Officer, Mary Smith" at Tulane, or "EEO."

In the district court billing references reflecting Ms. Tygier's work on an EEOC letter came under scrutiny. After it became necessary to "explain" those EEOC billing entries, Ms. Tygier began referring to Mary Smith by an incorrect title, "EEOC/Affirmative Action Compliance Officer."[12] The previous distinction Ms. Tygier made between "EEO" or "Equal Opportunity Officer" at Tulane and the "EEOC," a federal agency, vanished.

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[9] Tulane's In-house Counsel stated: no bargaining, i.e., tenure negotiations, and Dr. Hartz testified: "I didn't go to them for tenure negotiations." R.979-980.

[10] R.1025.

[11] R.1022-1024.

[12] R.533-535.

Mr. Kutcher and Ms. Tygier cite to a letter where Mr. Farrugia addressed Mary Smith. Mr. Farrugia addressed Mary Smith as "Associate Vice President, Equal Opportunity/Affirmative Action."[13] Mr. Farrugia's letter does not refer to Mary Smith as "EEOC/ Affirmative Action Compliance Officer," or EEOC as Mr. Kutcher and Ms. Tygier contend. *Id.*

Mr. Kutcher and Ms. Tygier filed affidavits to support their "explanation" the scope of their representation was limited. However, their affidavits are controverted by their billing records, the letter to Mary Smith, Dr. Hartz's deposition testimony, and contemporaneous e-mails.

According to Mr. Kutcher's Affidavit,[14] he merely spoke with Dr. Hartz; but, the invoices show he reviewed documents: "6/22/2003 RAK Called attorney; called client, Dr. Renee Hartz; *review of documents*" "Hours 1.50."[15] Thus Mr. Kutcher's affidavit is contradicted by the invoices. The 6/30/2003 e-mail from Dr. Hartz corroborates Mr. Kutcher reviewed documents. It states: "Bob Kutcher was on vacation in New York but he found time *to read my files and give me some good advice.*"[16]

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[13] R.467.

[14] R.531-532.

[15] R.470.

[16] R.1701.

Ms. Tygier's Affidavit asserts she merely assisted Dr. Hartz in reviewing and revising "a letter to Mary Smith." The first paragraph of the Mary Smith letter states: Dr. Hartz "should not file a complaint with EEOC until [she] received tenure."[17] The first paragraph of the Mary Smith letter raises the issue about "the filing of an EEOC charge."

In reviewing and revising the Mary Smith letter, Ms. Tygier struck through numerous passages and suggested numerous additions.[18] Ms. Tygier did not strike the words "should not file a complaint with EEOC until [she] received tenure." That was advice to Dr. Hartz the statement was correct. Ms. Tygier's review and revision of the letter recommended a course of conduct to Dr. Hartz. Although the issue of when to file an EEOC charge was raised in the letter, and the charge filing period had elapsed, Ms. Tygier did not alert Dr. Hartz about that fact.

Ms. Tygier added the following language to the Mary Smith letter:

> I ask . . . remedial actions be taken, including . . . reinstatement, with full privileges, tenure, payment of lost wages, lost potential earnings, and *all rights afforded under all applicable laws and regulations*."[19]

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[17] R.1025.

[18] R.1025-1032.

[19] R.1032.

This language advised Dr. Hartz she had rights under applicable laws. Yet, her rights had been lost as the charge filing period had elapsed. Had Dr. Hartz been alerted to this fact, she would have realized she had a legal malpractice claim against Mr. Farrugia.

The district court ignored evidence showing the scope of the representation and the duty to Dr. Hartz was more comprehensive than merely providing editorial advice about a letter to Mary Smith.

II. Title VII Claims Time-barred

The Title VII litigation Dr. Hartz brought against Tulane University is not the underlying claim against Mr. Kutcher and Ms. Tygier. The "underlying claim" of Mr. Kutcher and Ms. Tygier's malpractice is Mr. Farrugia's malpractice.[20]

On March 15, 2006 the EEOC issued Dr. Hartz a "right to sue" letter. Dr. Hartz contacted undersigned counsel on May 31, 2006 with two weeks remaining to file suit, and retained undersigned counsel on June 1, 2006. On June 8, 2006 her Complaint (06-2977) against Tulane and its hospital, TUHC, was filed. On June 16, 2006 her Complaint (06-3164) against

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[20] Dr. Hartz's Complaint (06-4164) does not allege that Mr. Kutcher and Ms. Tygier were negligent in failing to advise her to *file* an EEOC charge. She alleges they were negligent in failing *to advise her that Mr. Farrugia had been negligent* in failing to advise her to timely file her EEOC charge to preserve her Title VII discrimination and retaliation claims.

Mr. Farrugia, Mr. Kutcher, and Ms. Tygier was filed. Before her Complaint against Tulane and TUHC was filed, Dr. Hartz was advised her Title VII claims would be time-barred if such an affirmative defense were raised under *Delaware State College v. Ricks*, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980), i.e., the ultimate loss of her employment at Tulane was the adverse effect of the tenure denial of June/July 2002. Notice to Dr. Hartz of that discrete event triggered the 300 day limitation period which expired before Dr. Hartz filed her EEOC charge.

The Fifth Circuit dismissed Dr. Hartz's Title VII claims against Tulane as time-barred as the EEOC charge was filed more than 400 days after the last discriminatory/retaliatory act. TUHC was dismissed because it had not been named in the EEOC charge. At oral argument it appeared the Fifth Circuit assumed undersigned counsel was responsible for the failure to timely file the EEOC charge, and failure to name TUHC.

Regarding Dr. Hartz's hostile work environment claim, she alleged her Department Chair, Dr. Hewitt, created a hostile environment. She alleged Dr. Hewitt's last discriminatory/ retaliatory act occurred July 16, 2002 when as a member of the Executive Faculty Committee ("EFC"), which vetoed the favorable tenure decision of the Tulane Medical School's Personnel and Honors ("P & H") Committee, he did not abstain from the EFC vote.

The Fifth Circuit reversed the district court because it had erred in not recognizing the EEOC charge had not been timely filed. The failure to file a timely EEOC charge resulted in her inability to challenge the alleged discriminatory conduct in court pursuant to 42 U.S.C. § 2000e-5(f)(1); *Ricks, supra*; and *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. ___, 127 S.Ct. 2162, 167 L.Ed.2d 982 (2007).

III. Surrebuttals Admitted

Mr. Kutcher, and Ms. Tygier filed two Motions for Summary Judgment. Dr. Hartz opposed the motions with one Opposition Memorandum. Thereafter, Mr. Kutcher and Ms. Tygier filed three Reply Memoranda In Support of Motions for Summary Judgment – which raised new issues. Four days later, Dr. Hartz responded with one Surrebuttal Memorandum. The district court denied Dr. Hartz leave to file her Surrebuttal Memorandum because it exceeded the page limit.[21] The next day, Dr. Hartz filed three separate (10 page) Surrebuttal Memoranda.[22] Mr. Kutcher and Ms. Tygier filed a motion to strike all Dr. Hartz's memoranda opposing summary judgment, asserting they were untimely and/or not served

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[21] R.1539.

[22] 3/12/09 (Leave To File) R.1541, 1543, 1545. R.1733-1749 (Surrebuttal and Objection); R.1688-1717 (Surrebuttal); R.1719-1731 (Surrebuttal).

properly. After Dr. Hartz demonstrated all her memoranda were timely filed and properly served,[23] the district court denied the motion,[24] and granted leave to file Dr. Hartz's Surrebuttal Memoranda.[25]

IV. Tulane's Medical School's P & H Committee Determined Dr. Hartz Was "Qualified For Tenure"

In late 1997, Dr. Hartz voluntarily relinquished certain of her cardiac surgical privileges ("pump privileges") at TUHC pending a review of some surgical cases. Her surgical results were similar to the male surgeons, but Dr. Hartz, the only female surgeon, nationally recognized prior to joining Tulane faculty, "was singled out and made a scapegoat for the system problems at TUHC."[26] Dr. Hartz maintained thoracic surgical privileges at TUHC, where she had an active thoracic practice, and full unrestricted cardiovascular surgical privileges at Charity Hospital, staffed by physicians at Tulane.[27]

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[23] R.1616-1628.

[24] R.1658, 1659; Hartz Appendix 3-4.

[25] 4/1/09 Order granting leave to file surrebuttals R.1687, 1718, 1732.

[26] Affidavit, Dr. Talano, former Chair Tulane Cardiology Department, R.1154-1160.

[27] Dr. Hartz traveled weekly to Houston, Texas, to work with Drs. Denton Cooley and O.H. Frazier, at the renowned Texas Heart Institute ("THI"). There she maintained her cardiac skills, had the benefit of independent evaluation by the THI

(Continued on following page)

Dr. Hartz was denied tenure in 1999. She appealed to the Tulane Faculty, Tenure, Freedom, and Responsibility Committee ("FTFR"). Mr. Kutcher and Tygier cite to the letter offer written by Dr. Flint and Dean Corrigan but ignore Dr. Flint's affidavit. Dr. Flint, Chairman, Department of Surgery, testified the offer of employment imposed no requirement that tenure would be dependent on any specific surgical privileges at TUHC.[28]

In 2001, in view of testimony and the FTFR recommendations, Tulane President Scott Cowen proposed a settlement agreement – an additional three year probationary appointment guaranteeing Dr. Hartz would receive tenure review during the second year of the period.[29] Accordingly, Dr. Hartz continued as a Professor of Surgery at Tulane.[30] On January 30, 2002, TUHC reinstated Dr. Hartz's full, unrestricted cardiovascular surgical privileges.[31]

Dr. Hartz was again considered for tenure May 20, 2002. Tulane Medical School's "P & H" Committee, under the provisions of Tulane's Faculty Handbook, the duly constituted faculty body charged

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group, and received outstanding evaluations. R.756-762, 1162-1168 Affidavit, Robert Hallett, M.D., Department of Cardiology, Tulane School of Medicine. R.913, 931.

[28] R.1109, 1113; R.1012-1013; 1020-1021 Flint, Affidavit.

[29] R.1120-1122.

[30] R.1123-1124.

[31] R.1747-1749.

with rendering a decision as to whether Dr. Hartz was qualified for an award of tenure, determined she was qualified for tenure at Tulane and voted in her favor 7-2 to recommend an award of tenure.[32] The EFC, an administrative committee,[33] rejected the recommendation of Tulane Medical School's P & H Committee.[34] The EFC did not determine the qualification for tenure and voted only to accept/reject recommendation. The EFC offered no reason for rejecting the P & H Committee's recommendation. The only explanation Dr. Hartz received was "the boys always vote together."[35]

Dr. Hartz appealed to the FTFR. The FTFR examined whether the EFC had the power to accept or reject the recommendation of the Medical School's P & H Committee to award tenure. The FTFR concluded, under the Medical School's Constitution, the EFC could accept or reject the recommendation. No other matters were considered by the FTFR.[36] The

[32] Tulane's P & H Committee determined Dr. Hartz was qualified for tenure and recommended an award of tenure to her in disregard of the vigorous opposition of her Chairman, Dr. Hewitt. Affidavit of Philip Kadowitz, Ph.D., Member Tulane University School of Medicine, P & H Committee. R.1174-1177.

[33] R.1127-1128.

[34] R.1061.

[35] R.913, 966; R.1744-1746.

[36] R.382.

FTFR did not vote "against granting her tenure" as Mr. Kutcher and Ms. Tygier contend.

CONCLUSION

The district court erred in granting summary judgment on Dr. Hartz's legal malpractice claim against Mr. Kutcher and Ms. Tygier. The district court ignored genuine issues of material fact concerning Mr. Kutcher and Ms. Tygier's scope of the representation and duty to Dr. Hartz. The district court also misconstrued the facts and drew inferences in favor of Mr. Kutcher and Ms. Tygier.

The Fifth Circuit Court affirmed without reasons and sanctioned such a departure from the accepted course of judicial proceedings by the district court as to call for an exercise of this Court's supervisory power.

This Court should grant Certiorari.

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